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BUREAU OF SPECIAL EDUCATION APPEALS

DECISIONS

VOL 42 pp 42-1 - 42-281

The Commonwealth of Massachusetts
Department of Education

1385 Hancock Street, Quincy, Massachusetts 02169-5183

SUMMER, 1991

The Bureau of Special Education Appeals is publishing decisions rendered by hearing officers in Chapter 766 cases since the implementation of the law in 1974. This forty-second volume contains 29 recent BSEA decisions.

The decisions are categorized by issues addressed in the body of the decision. All volumes contain an index code which assigns numbers to each issue, and an index that lists beginning page numbers to all decisions in that volume by category.

These decisions have been printed in a limited number and disseminated throughout the Commonwealth of Massachusetts. Decisions may be copied, but volumes should remain at the depository. A list of Depositories of these decisions is available from the Bureau.

This is a sample of the cover sheet attached to all decisions.

BUREAU OF SPECIAL EDUCATION APPEALS

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APPELLANT

V.

_ _ _ _ _ _ PUBLIC SCHOOLS

APPELLEE

BEFORE

_ _ _ _ _ _, BSEA HEARING OFFICER

_ _ _ _ _ _, ESQ., FOR APPELLANT

_ _ _ _ _ _, ESQ., FOR APPELLEE

This is a sample of information attached at the end of each decision.

DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF BUREAU DECISION AND POST-DECISION PROCEDURES

MOTIONS FOR RECONSIDERATION OR TO RE-OPEN

Motions for Reconsideration and Motions to Re-open, setting forth the grounds for the motion, must be submitted in writing to the Hearing Officer within fifteen days of the date of the decision. Receipt of timely-submitted motions will stay the decision and time for appeal. The stay will exist only until the date of the ruling on the motion. The decision to grant or deny motions for reconsideration or to re-open lies within the sound discretion of the Hearing Officer.

1. Motion for Reconsideration. The grounds for a motion for reconsideration are limited to serious error of law or misconstruction of pertinent rules, regulations, policies or procedures. The Hearing Officer will not take additional evidence, but will decide the motion based on the written arguments of the parties.

2. Motion to Re-Open. The grounds for a motion to re-open include, but are not limited to:

   a. mistake, inadvertance, surprise, or excusable neglect;

   b. fraud, misrepresentation, or misconduct of any party;

   c. newly-discovered evidence, in existence at the time of the hearing, but which could not have been discovered with due diligence, if the introduction and proof thereof would likely alter the outcome of the hearing.

The Hearing Officer may convene a hearing to take additional evidence or argument, pursuant to this motion.

EFFECT OF DECISION AND RIGHTS OF APPEAL

The decision of the Bureau of Special Education Appeals is final and, except as provided above with regard to post-decision procedures, is not subject to further agency review. Any party may file a complaint in the Superior Court of competant jurisdiction or in the District Court of the United States for Massachusetts for review of the Bureau decision. 20 U.S.C. s. 1415(e)(2). Under Massachusetts General Laws Chapter 30A, Section 14(1), appeal of a final Bureau decision must be filed within 30 days of receipt of the decision.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Under G.L.c. 30A, s. 14(3), appeal of the decision does not operate as a stay; rather, a party seeking to stay

CONFIDENTIALITY;

In order to preserve the confidentiality of the child involved in these proceedings, when an appeal is taken to Superior Court or to Federal District Court, the parties are strongly urged to maintain the confidentiality of these proceedings by filing the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See, Webster Grove School District v. Pulitzer Publishing Company, 898 F. 2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Department of Education, through the Attorney General's Office, may move to impound the documents.

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Michael M. v. Pittsfield

89-1855

DECISION

This decision is issued pursuant to M.G.L. c. 71B and 30A, 20 U.S.C. 1401 et seq. and the regulations promulgated pursuant to those statutes.

A hearing was held on November 9, 1989, January 22, February 12, February 13, February 15, April 11, and April 12, 1990. The first three days of the hearing were held at the Children's Study Home in Springfield, Massachusetts, and the remaining four days were held at the Greater Springfield Regional Education Center in Chicopee, Massachusetts. The record consists of exhibits submitted by the Massachusetts Department of Social Services ("DSS") labelled P-1 through P-19, exhibits submitted by the Pittsfield Public Schools ("Pittsfield") labelled S-1 through S-15 and approximately 30 hours of recorded oral testimony. Closing arguments were submitted on or before April 27, 1990 and the record closed on that date.

Those present for all or part of the hearing were:

Karen Shaw	Assistant Teacher, Children's Study Home
Shirley Dillard	Social Worker, DSS
Catherine A. Tower	Supervisor of Special Education, Pittsfield
Catherine Gubelman	Special Education Teacher, Morningside School, Pittsfield
Kevin Tobin	Clinical Psychologist, Pittsfield
Alfred Terranova	School Adjustment Counselor, Pittsfield
Robert Timmins	Principal, Pittsfield
Angela R.	Foster mother
Annelis Goulet	Special Education Teacher, Pittsfield
James P. Smith, M.D.	Psychiatrist
Allen Zippin	Director of Education, Children's Study Home
Geraldine French	Clinical Supervisor, Children's Study Home
Joseph P. Robitaille	Latency Program Manager, Children's Study Home
Donna Weber	Social Worker, Berkshire Mental Health Center
Audrey Ringer	Social Worker, Berkshire Mental Health Center

Kathy Zilberman, PhD	Psychologist, Berkshire Health Health Center
Marie Robitaille	Attorney for DSS
Paul W. Cormier	Attorney for Pittsfield
Jane M. Lavoie	Hearing Officer

ISSUES

1. Is the 1989-1990 IEP prepared by the Special Education Director of Pittsfield reasonably calculated to provide the maximum feasible educational benefit to Michael in the least restrictive setting?

2. If not, is the Children's Study Home, a private school located in Springfield, Massachusetts, the least restrictive placement appropriate for Michael?

STUDENT PROFILE

Michael is a 13 year old boy, who first entered the foster care system at the age of 2. Michael has a history of severe behavioral and emotional difficulties. He tests as having average to above average intellectual ability. While he is able to perform at grade level in most academic subjects, he has difficulty with attention and impulse control in the classroom. Michael has exhibited verbal and physical aggression, poor impulse control, distractability, hyperactivity, lying, stealing and firesetting. In March 1989 DSS removed Michael from foster care and placed him in a residential facility.

DSS'S POSITION

Michael needs a 502.6 residential placement. He is unable to function successfully in a family living arrangement or a public school setting, because neither setting is sufficiently structured to deal with the magnitude of his acting out-behavior. Pittsfield has failed to provide Michael with an appropriate individual education plan. While in the substantially separate classroom offered by Pittsfield, Michael was unable to concentrate or follow directions, had difficulty controlling his impulses and was not functioning to his potential. Pittsfield had difficulty controlling Michael in the classroom, as evidenced by contacts with his foster mother and the Berkshire Mental Health crisis team. Michael needs a 24 hour behavior management program. The Children's Study Home, a residential care facility located in Springfield, is the appropriate placement for him at this time.

SCHOOL'S POSITION

Michael needs a substantially separate community-based education program with therapeutic components and mainstreaming available, coupled with a small, structured foster placement. Michael was academically successful in the program prototype 502.4 classroom at the Morningside School in Pittsfield. His work habits and behavior

need improvement, and he would benefit from behavior modification and counseling. However, while at the Morningside School, Michael demonstrated good ability, learned quickly and worked with supervision. His acting out behavior in Pittsfield Public Schools was not as frequent, or as severe, as it was in his foster home, or as it is at Children's Study Home. Michael was placed in residential care not for educational reasons, but because of his behavioral difficulties and inability to function in his foster placement. Pittsfield did not conduct a TEAM meeting or produce an IEP for the 1989-1990 school year. After the close of the hearing the Special Education Director of Pittsfield prepared a plan calling for placement in the Middle School therapeutic program in Pittsfield.

SUMMARY OF THE EVIDENCE

1. Michael is a 13 year old boy (D.O.B. 11/10/77), who was first identified by DSS as a child suffering from abuse and neglect when he was 2 years old. Between the age of 2 and 6, Michael had several separations from and returns to his biological family, and was placed in several foster homes. In 1983, when Michael was 6 years old, he and his younger sister were placed at the home of Angela R. Michael remained at the R. home until March 1989, when DSS placed him in residential care. (Testimony of Donna Weber, Shirley Dillard).

2. Ms. R. is a single parent. From 1985 to date, between 4 and 6 foster children have resided in her home. Many of the children placed with Ms. R. have serious behavioral difficulties, have been rejected from other foster homes and are in therapy at Berkshire Mental Health Center. For the last five years Berkshire Mental Health Center has provided a liaison to assist Ms. R. in working with individual children. (Testimony of Audrey Ringer).

3. At the time of his initial placement with Ms. R., Michael was an emotionally troubled youngster,who was exhibiting serious behavioral problems. His behavior continued to deteriorate over time. While living at the R. home Michael engaged in whining, stealing, lying, firesetting, night wandering, and acts of verbal and physical aggression. (Testimony of Angela R., Donna Weber, Audrey Ringer, Shirley Dillard).

4. From September 1987 until June 1988 Michael attended a regular education classroom at the Allendale School in Pittsfield. He received "consultation for behavioral considerations" under a program prototype 502.1 IEP. According to an assessment completed by special education teacher, D. Beach, in March 1987 (Exh. S-13), Michael's behavior was of concern to classroom teachers. Ms. Beach reported that Michael was extremely distractable, needed constant 1:1 supervision to complete any work, and had a history of taking other people's belongings.

Ms. Beach administered the Woodcock Johnson Psycho-Educational Battery of Achievement Tests to Michael in March 1987. According to Ms. Beach, the results indicated that there was no significant discrepancy between Michael's ability and achievement, and that

Michael was capable of average to above average work in all areas. Michael performed at grade level in math (3.6*), and above grade level in reading (5.5*), written language (4.6*), knowledge (5.2*), and skills (12.9*).

5. Foster mother, Angela R., testified that she was contacted frequently by Allendale School personnel and asked to pick Michael up because he was having a bad day. According to Ms. R., Allendale staff expressed concern about Michael hurting others and about Michael's inability to concentrate on his work. Ms. R. testified that the driver of the regular education bus could not handle Michael, and therefore he was placed on the special education bus. Michael was frequently thrown off the special education bus because of his behavior, and so Ms. R. often transported Michael to Allendale School.

6. Shirley Dillard, Adoption Specialist, DSS, testified that when Michael was attending Allendale School, she received frequent calls from school adjustment counselor, Ward Johnson. According to Ms. Dillard, Mr. Johnson reported that Michael's behavior was uncontrollable, that he was functioning poorly in school, picking fights and running out of the classroom. Ms. Dillard testified that Angela R. was called to the school 2 to 3 times per week, and that Michael had almost daily problems on the school bus.

7. At a TEAM meeting held in April 1988, DSS and Pittsfield agreed that Michael would be referred for psychological testing. (Testimony of Shirley Dillard). In May 1988 Michael was seen by Dr. Kathy Zilberman, psychologist, Berkshire Mental Health Center. The symptoms Michael was exhibiting at the time included stealing, lying, poor peer relations and impulsive disruptive behavior in the classroom.

Results of the intellectual testing conducted by Dr. Zilberman revealed that Michael has average intelligence and shows particular strengths in the area of perceptual motor skills. Projective testing results suggest that Michael is a child who feels vulnerable and out of control, with little in the way of organized resourses to deal with the world. According to Dr. Zilberman, Michael's self esteem is extremely low, and he fears that if he allows the expression of his impulses, he will be punished and isolated. Therefore, Michael attempts to withdraw his investment in the world around him. According to Dr. Zilberman, Michael's acting out behavior is a symptomatic expression of his sense of deprivation and his sense of himself as bad.

Dr. Zilberman found that Michael is desperately in need of an environment that will help him control his acting out in a nonpunitive manner, so that he can develop a less punitive, more age appropriate superego and a more positive self-image. Dr. Zilberman suggested that Michael's interest in art, and skills in perceptual

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*Grade level scores achieved on Woodcock Johnson in March 1987, see Exh. S-13.

motor tasks might be used therapeutically in self expression and the enhancement of his self esteem.

Although the report written by Dr. Zilberman at the completion of her evaluation did not mention residential placement, at the time of her testimony, Dr. Zilberman indicated that Michael needed such a placement. According to Dr. Zilberman, all of Michael's resources were tied up with trying to control his behavior at the expense of his other development. While Michael was not behind academically, he was unable to handle the classroom. Michael's self esteem was going downhill. Although he was performing at grade level in school, Dr. Zilberman felt that Michael was failing emotionally, psychologically and behaviorally. Dr. Zilberman also believed that the severe behaviors Michael was exhibiting at home would eventually occur at school, and prevent Michael from making effective progress.

Dr. Zilberman testified that it was a psychological risk for Michael to continue his placement in a foster home where "the level of restraint necessary was possibly abusive." According to Dr. Zilberman, because Michael's ability to control himself was limited, he would act out if moved to another foster home and the placement would fail. The inability of people to deal with his acting out would make Michael feel worse and worse.

Dr. Zilberman testified that Michael needs a highly structured therapeutic environment, where his behavior can be controlled and understood. Michael needs therapy and work on relating to peers. In addition, Dr. Zilberman stated that Michael needs a behavioral management program in which the expectations are clear and Michael can be rewarded for his efforts. According to Dr. Zilberman, Michael needs a setting where what is done to him is not abusive, but where he is safe from hurting himself or others.

8. In September 1988 Michael was placed in a program prototype 502.4 substantially separate classroom at Morningside School in Pittsfield. The classroom contained 8 other students, one teacher, and two aides. One of the aides was assigned to provide 1:1 assistance to one particular student, the other aide assisted with the remaining students. In addition, a caseworker, school adjustment counselor and consultant from Berkshire Mental Health Center were assigned to provide supportive services to the classroom, and the school psychologist and school coordinator were available to assist as needed. (Testimony of Robert Timmins, Catherine Gubleman, Kate Towers).

Michael remained in the substantially separate classroom for academic instruction, and was mainstreamed for art, lunch, recess, special class activities and field trips. He received weekly counseling from Donna Weber, Berkshire Mental Health Center.

Michael's teacher at Morningside School, Catherine Gubelman, testified that her classroom was geared to students with behavioral difficulties, and that she employed a behavior modification program. Each day a point sheet was given to each student. (Exh. S-12). Points were awarded during each subject on a scale of 4 (for superior

behavior) to 0 (for inferior behavior). Points were totaled at the end of each day and students who did well would have a note sent home and might receive a small prize. Ms. Gubelman testified that Michael did receive a daily prize on occasion, but she could not recall how many times. She estimated twice per week. At the end of each week, students who had received a certain number of points could pick a prize out of a box. Ms. Gubelman testified that Michael had a hard time earning enough points for this reward, so once or twice a month she would set a special behavioral goal for him and if he achieved it, he would be allowed to pick a prize.

Ms. Gubelman testified that Michael had behavioral problems, needed time-outs, and on approximately nine occasions had to be physically restrained at school. According to Ms. Gubelman's record (Exh. S-13), two of the restraints were necessitated by behavior on the school bus and one occurred in gym class. Three of the restraints occured in November, four occurred in January, and Ms. Gubelman was uncertain of the dates of the remaining two.

On a special education assessment completed in March 1989, Ms. Gubelman states: "Michael continues to have social/emotional issues that affect his daily performance within the classroom. Primary concerns for Michael revolve around impulsive behavior, inability to interact and cooperate with others, and inability to participate [in] or complete tasks." On a quarterly progress report completed midway through the year, Ms. Gubelman notes that Michael had difficulty controlling his impulses in several areas including fighting with peers, taking items belonging to others and arguing with both peers and staff. Ms. Gubelman testified that Michael's behavior within the classroom was inconsistent. He had some excellent days and some days when he was upset or depressed and unable to participate or concentrate. According to Ms. Gubelman, on bad days it was extremely difficult for Michael to follow oral directions and cooperate with others.

For the first two quarters of the 1988-1989 school year, Ms. Gubelman's records indicate that Michael needed improvement in reading and spelling. In both subjects he tended to hurry through his work and, therefore, make frequent errors. According to Ms. Gubelman, Michael's performance was satisfactory in language arts, and mathematics. In science Michael's performance was satisfactory during the first quarter, but needed improvement during the second quarter. Ms. Gubelman reported that Michael needed to improve his ability to participate in larger group lessons and his ability to complete individual work.

The Woodcock Johnson Psycho-Educational Battery of Achievement Tests was administered to Michael on March 22, 1990. Michael achieved at or above grade level performance in all subjects. His grade level scores as reported by Ms. Gubelman were: reading 6.2, mathematics 5.4, written language 6.7, and overall skills 5.5. All scores had improved since his last testing in 1987.

9. Dr. Robert Timmins, principal of Morningside School, testified that he was involved in two incidents of restraint

concerning Michael. The first occurred in late October or early November 1989. Students were boarding the bus at the end of the day, when Michael begin fighting with another student. Both students were pulled off the bus. When he was brought into school, Michael did not calm down, but thrashed out, kicking over tables and chairs, and needed to be physically restrained for approximately 45 minutes. According to Dr. Timmins, three adults participated in the restraint. Ms. R. was called and came to pick Michael up at school. The other restraint involving Dr. Timmins also took place at the end of the school day, this time in January 1990. Again, three adults were involved in the restraint. Michael calmed down in approximately 5 minutes.

Dr. Timmins testified that he was not concerned about teacher safety around Michael. He also testified that Michael's behavioral problems did not stand out more than those of other students. According to Dr. Timmins, academically, Michael was one of the better students in Ms. Gubelman's class. Dr. Timmins testified that he did not recall any conversations about the school providing services to help Ms. R. deal with Michael's behavior at home. Dr. Timmins did recall that Ms. R. told him that Michael was unmanageable at home and that an alternative placement should be found. According to Dr. Timmins, DSS did not express any concern about Michael's academic performance. Dr. Timmins testified that Michael was unexpectedly pulled from school in March 1990, and placed at Children's Study Home, and that Pittsfield did not participate in the placement process.

10. Alfred Terranova, School Adjustment Counselor at Morningside School, testified that he never participated in any interventions with Michael, and was not aware of any major behavioral incidents involving Michael. To Mr. Terranova's knowledge, Michael was not experiencing academic difficulties or adjustment problems. Mr. Terranova testified that Michael was receiving counseling at Berkshire Mental Health Center, and that Pittsfield was not involved in Michael's sudden placement at Children's Study Home.

11. Kate Towers, Special Education Director of Pittsfield, testified that on March 8, 1990 a DSS worker called her to report that Michael was being inverviewed at Children's Study Home ("CSH"), and to request a TEAM meeting. This was the first time Ms. Tower knew of possible placement for Michael at CSH. Ms. Tower testified that in early 1989 DSS worker, Shirley Dillard, and therapist, Donna Weber, called her to discuss problems with Michael in his foster home, including incidents of firesetting and night wandering. DSS did not express concerns to Ms. Tower about Michael's behavior or performance at Morningside School, and did not seek modifications to Michael's program at Morningside.

According to Ms. Tower, Michael often came to school agitated and became agitated when leaving, but he was not out of control in the classroom. During Ms. Tower's classroom observations, Michael was not acting out, but instead seemed depressed and withdrawn. In Ms. Towers' opinion, Michael exhibited a slight language-based learning disability, but did well when he attended to task.

Pittsfield did not produce an IEP for Michael for the 1989-1990 academic year. After the conclusion of the hearing, Ms. Towers drafted a document calling for placing Michael at the Reed Middle School. Ms. Towers testified that Michael's classroom at Reed would have contained 7 students, a teacher, an aid, a caseworker, a school adjustment counselor and a consultant.

12. Angela R., testified that from September 1988 to January 1989 she went to Morningside School every Friday and usually spoke to Ms. Gubelman. Ms. Gubelman reportedly told Ms. R. that Michael was all over the classroom, would not sit down, and was intimidating other children. Ms. R. testified that she was called to Morningside School to pick up Michael approximately three time. On one occasion Michael was out of control, could not be placed on the bus, and threw furniture when taken back into school. On a second occasion Ms. R. was told that Michael had been separated from the class all day. On a third occasion Michael had been continually running out of the classroom. Ms. R. testified that in December 1988 DSS worker Shirley Dillard instructed her to stop going to Morningside School to assist with Michael. Ms. Dillard testified that this instruction was initially given to Ms. R. in October 1988.

13. Donna Weber, Berkshire Mental Health Center, testified that she saw Michael for individual therapy from June 1987 through January 1989. According to Ms. Weber, Michael was exhibiting many behavioral symptoms when she initially began working with him, including firesetting, stealing in school, distractability, and difficulty with peer interactions.

Ms. Weber testified that by January 1989, Michael's behavior had deteriorated to the point that he needed to be placed in respite care at Key Shelter every weekend. According to Ms. Weber, Michael had become more physically aggressive and more frequently in need of physical restraint. He posed difficult management problems and needed constant observation in any setting. Ms. Weber testified that foster mother Ms. R. had become overwhelmed caring for Michael, and needed the mental health respite provided by Michael's weekend placement at Key.

According to Ms. Weber, Michael continued to spend weekends at Key Shelter until his placement at CSH in March 1989. Berkshire Mental Health Crisis Team was consulted each time Michael was placed at Key because they needed to approve use of the crisis bed for Michael. Ms. Weber testified that the crisis team was contacted by Morningside School personnel in January 1989 during the incident in which Michael threw furniture in school after he had been taken off the bus. According to Ms. Weber, the crisis team approved Michael's ongoing weekend placement at Key in an effort to maintain his foster home.

Key staff reported to Ms. Weber that Michael was initially cooperative at Key Shelter and participated in programs easily. Over time his behavior deteriorated to the point where he needed constant

1:1 supervision. Michael began stealing, lying, and wandering at night, and he was unable to interact appropriately with peers.

According to Ms. Weber, Michael has a demanding, draining style of relating, and he is in need of intensive work in residential setting. The fact that Michael's behavior was becoming unmanageable at Key Shelter confirmed Ms. Weber's opinion that a residential placement was necessary.

Ms. Weber testified that Michael was placed at CSH not for educational reasons, but rather because of his behavioral problems. Ms. Weber also testified that Michael's behavioral problems were preventing him from reaching his potential intellectually.

14. Kathleen Ann Miller, caseworker at Key Shelter, testified that Michael initially came to the shelter, because of a firesetting incident in his foster home. Michael stayed at Key approximately every weekend from January through March 1989. According to Ms. Miller, Michael was staffed 1:1 at the Shelter because of his firesetting history. Michael's honeymoon period at Key ended after his second weekend, when he began stealing things from other children and staff, attempting to unlock the cabinet where knives and chemicals were stored, and disobeying staff. According to Ms. Miller, Michael needed to be watched at all times. He was 4 to 5 years younger than most of the other children placed at Key. Ms. Miller testified that initially the other children put up with Michael because he was younger, but by the end of three months he was "driving everyone crazy." According to Ms. Miller, Michael constantly antagonized people through verbal abuse, stole things, argued with other children, verbally attacked and provoked other children, threw furniture, and opened windows and doors setting off alarms. Michael required physical restraint at the Shelter on three occasions. One incident involved Michael stealing a butter knife and threatening another child with it, one involved an argument with another child, and one involved Michael throwing furniture. In addition Michael required frequent time-outs. According to Ms. Miller, Michael did not always understand the consequences of his behavior.

15. In early March 1989, DSS informed Pittsfield that Michael was being interviewed at CSH, a residential care facility located in Springfield, MA. On March 18, 1990 special education director, Kate Tower, asked school psychologist, Kevin Tobin, to evaluate Michael in order to determine how well he was functioning in the classroom. In accordance with this request, Dr. Tobin conducted an evaluation of Michael on March 21, 1990. Dr. Tobin interviewed Michael and his teacher, observed Michael in the classroom, and completed the Attention Deficit Disorder Checklist, Reynolds Adolescent Depression Inventory, Hamilton Anxiety Scale and Children's Life Style Guide.

According to Dr. Tobin, Michael's speech was of low volume, his mood depressive, and his affect blunted. Michael displayed no evidence of hostility or suspiciousness in his manner. His thought content was somewhat impoverished, but his thought process was well organized.

According to Dr. Tobin, Michael's scores on the Hamilton Anxiety

Scale and the Reynolds Adolescent Depression Scale indicate that in addition to his impulse control difficulty, Michael is a depressed and mildly anxious boy. In Dr. Tobin's opinion, Michael feels lonely and unloved, and has low self esteem. Michael's projective responses indicate that this is due to feelings of not having a real home and not having anyone who really cares for him.

In Dr. Tobin's opinion, Michael does not know how to cope with these feelings, except by increasing his restlessness and irritability. Michael told Dr. Tobin that one thing that made him feel worse was having a fellow foster child return to that child's "real mom."

According to Dr. Tobin, in addition to Michael's problems of depression, he has all the symptoms of Attention Deficit Disorder, including overactivity, distractability, low frustration tolerance, frequent interruptions of others, and difficulty following directions and controlling his impulses. Dr. Tobin noted that the superimposition of these two disorders often results in greater behavioral disturbance, increased agitation and greater irritability. Dr. Tobin indicated that nonetheless, Michael's behavior was not severe enough to cause him to be removed from school or inappropriate in the classroom. According to Dr. Tobin, Michael demonstrated that he was responsive to the interventions of his teacher and valued positive attention and structured activity.

Dr. Tobin concluded that while Michael's behavior is disturbing, impulsive and distractible, it is not unmanageable in the classroom or school setting. Dr. Tobin recommended a firm, but supportive, home environment for Michael, with few other children to compete for attention. Dr. Tobin suggested the DARE Mentor Program or the Tri-County Youth SPARK Program. In Dr. Tobin's opinion a residential setting would be counter productive for Michael in the short and long run. Dr. Tobin recommended continued substantially separate classroom placement along with ongoing medication monitoring and cognitive - behavioral intervention to help Michael develop self control skills.

Dr. Tobin testified that the program in Pittsfield that he would recommend for Michael is the adolescent support program, which is co-funded by the Department of Mental Health. According to Dr. Tobin, this is a program for children who are severely emotionally and/or behaviorally disordered. The adolescent support program has a social worker, who provides therapy to students and their families. Group therapy is provided twice a week. The program is for high school aged students, contains an extensive vocational component and runs 12 months per year. According to Dr. Tobin, Michael needs this more restrictive program until he stabilizes. Then he should be transferred to Reed Middle School.

According to Dr. Tobin, Michael needs a therapeutic foster family with a small number of children and highly-trained parents. Michael needs a corrective emotional environment with clear consistent limit setting, clear frequent nurturance and a low ratio of foster children: parents. In Dr. Tobin's opinion, Michael's educational program should employ a behavior modification system with clear rules. Michael should receive frequent praise for positive behavior. In addition the

program should provide a school-family liaison, and Michael's foster parents should be trained in behavior modification techniques. According to Dr. Tobin, Michael would also benefit from family therapy and a structured recreational program.

16. DSS had agreed to Michael's placement at the Morningside School in the fall of 1989, but had also requested an independent evaluation. (Testimony of Shirley Dillard). In a letter dated October 3, 1989, Dr. Eberwein, then Director of Special Education for Pittsfield, summarily denied this request and refused to assume financial responsibility, even for "those parts of Michael's evaluation at Bay State which deal with his educational needs." Pittsfield did not approve payment for an independent evaluation until February 9, 1990. (Exh. S-4).

Michael was subsequently referred to Bay State Medical Center for a comprehensive set of evaluations, which were conducted between February and April 1989.

17. Ms. Patricia Joyce of Bay State Medical Center conducted an occupational therapy evaluation of Michael on February 28, 1989. (Exh. P-1). Ms. Joyce conducted clinical observations and administered the short form and fine motor subtests of the Bruininks-Osteretsky Test of Motor Proficiency, several subtests from the Southern California Sensory Integration Tests, and the Motor Free Visual Perception Test.

Overall, Michael performed within the lower end of the average range for children his age. Ms. Joyce expressed some concern over Michael's tendency to sit with a rounded flexed trunk, along with his difficulty in maintaining a prone extension posture and diminished nystagmus scores. According to Ms. Joyce, another area of mild concern was the inconsistencies Michael shows in trunk rotation and mid-line crossing. Ms. Joyce did not recommend occupational therapy, but instead indicated that the identified areas of concern could be addressed by a physical education teacher. Ms. Joyce suggested that a program to strengthen back and leg extensor muscles and to encourage trunk rotation might have an overall positive effect on Michael's posture. According to Ms. Joyce, an improved posture might in turn have a positive affect on Michael's mood and outlook.

18. An educational evaluation of Michael was conducted by Marlene Gordon at Bay State Medical Center on February 27 and 28, 1990. Ms. Gordon administered the Test of Written Spelling (TWS), Test of Written Language (TOWL), Diagnostic Reading Scale (DRS), Key Math Diagnostic Arithmetic Test (Key Math), Lindamood Auditory Conceptualization Test (LAC), and Detroit Tests of Learning Aptitude (Detroit).

According to Ms. Gordon, Michael is a child of average cognitive skills, who generally demonstrates grade level skills in the one-to-one testing situation. Michael demonstrates an instructional reading level of mid-fifth grade, appropriate skills in spelling phonetically predictable words, and average skills in the cognitive, conventional, and linguistic components of written language. He is functioning in

general within six months of grade level in math. Michael shows some relative weaknesses in a few language-related areas, including spelling of phonetically unpredictable words, producing appropriate vocabulary in independent work, short term sequential memory, and processing complex oral directions. Michael's learning aptitude tests reflect significant discrepancies in three of the four domains assessed: cognitive, attential and motoric. According to Ms. Gordon, Michael's performance indicates that he functions far better in tests that are conceptual rather than structural, those that utilize long-term rather than short-term memory and do not require focused concentration, and those that are relatively motor free.

Ms. Gordon found that Michael's test results reveal a subtle language-based learning disability that prevents him from achieving to his maximum potential. According to Ms. Gordon, within Michael's substantially separate classroom, it should be feasible to present his curriculum in ways that help narrow the gap between potential and achievement in written language. Ms. Gordon recommended the following adjustments to Michael's classroom:

1. Utilize a "total language" approach, incorporating language experience techniques. According to Ms. Gordon, this would allow integration of vocabulary development, reading and writing stories, and speaking. All aspects of language arts should be integrated into a comprehensive whole. As an example, Ms. Gordon indicated that vocabulary could be elicited from a picture, meanings of the words discussed, then related to synonyms and antonyms, and finally used in sentences and stories. Within that context other specific skills such as grammar and punctuation could be addressed as well.

2. Incorporate math, science, and social studies into the context of the language experience approach, using vocabulary from the social science text, science experiments, word problems, and so forth.

3. Focus spelling skills on phonetically unpredictable spelling patterns, prefixes and suffixes. According to Ms. Gordon, color coding or other visual techniques might help Michael to focus on these patterns.

4. Modify or decrease written work requirements.

5. Repeat oral directions and accompany them with written directions.

6. Incorporate pencil and paper components in math lessons, work to improve automatic retrieval of math facts, and use a calculator as a reinforcer.

7. Set in place a very structured behavior management system, as an underlying basis for all academics. Focus should be on decreasing impulsivity, increasing attentional skills and on-task behavior, and improving motivation to succeed.

According to Ms. Gordon, Michael may also respond well to a contract system, in which he agrees to fulfill certain responsibilities for which specified reinforcement will be given.

19. A psychological evaluation of Michael was conducted by Susan McQuiston at Bay State Medical Center on March 29, 1990. Dr. McQuiston interviewed Michael and administered the Roschach and Thematic Apperception Tests. Dr. McQuiston found that Michael has significant behavioral and emotional difficulties which will require substantial intervention both at home and at school. According to Dr. McQuiston, Michael does does better in one-to-one situations and will continue to require a highly structured environment with close adult supervision. Michael will not do well in a situation in which there is a high child:adult ratio. Dr. McQuiston recommended a consistent and well-defined behavior modification program which can be implemented in both home and school settings.

Dr. McQuiston noted that in addition to behavioral difficulties, Michael shows some cognitive weakness in the specific areas of language and temporal sequential organization, which will require special education remediation. According to Dr. McQuiston, these processing difficulties may be exacerbating Michael's problems with behavior and impulse control.

During his interview with Dr. McQuiston, Michael demonstrated some evidence of dysphoric mood. According to Dr. McQuiston, given the instability of Michael's home life, his chronic problems in school, and his fundamental difficulties with impulse control, Michael will require ongoing psychotherapy. Dr. McQuiston recommended that Michael's caregivers at home should also be involved in a program of family therapy, aimed at helping them cope with and manage Michael's difficult behavior.

20. Pediatrician, Nancy Kloczko, conducted an overall evaluation of Michael at Bay State Medical Center on February 21, 1990. According to Dr. Kloczko, physical examination of Michael revealed a healthy prepubertal boy. Neurological exam showed some mild asymmetries and neuromaturational inefficiencies, but the exam was essentially normal, and Dr. Kloczko saw no need for further neurological evaluation. Dr. Kloczko found that Michael has a mild scoliosis which will need to be monitored during his growth spurt.

Dr. Kloczko noted that Michael has been under the care of a neurologist, Dr. Thomas Stowe, who has prescribed and monitored Michael's response to a variety of medications. At the time of Dr, Kloczko's examination, Michael was taking 20 mg. of Dexedrine Spansules in the morning and 15 mg. at noon. His foster mother reported to Dr. Kloczko that with this medication Michael shows a mild improvement for 2-3 hours. In addition Michael was taking 100 mg. of Impramine at bedtime, which Ms. R. described as a "godsend" to help Michael fall asleep and decrease nocturnal wandering. Dr. Kloczko noted that both Ritalin and Cylert were tried on Michael in the past and resulted in negligible, if any, improvement in Michael's behavior.

Neurodevelopmental testing conducted by Dr. Kloczko suggests that Michael has difficulty with sequential organization, including both fine and gross motor sequential patterns, and the understanding of temporal concepts, as well as straight forward sequencing abilities. Dr. Kloczko noted that at times Michael appears to use memory to help compensate for his weaker sequential organization. Michael also appears to have difficulty with pencil control and precision in writing and drawing. Dr. Kloczko also noted mild language weaknesses involving most aspects of language processing and production, including receptive and expressive language and word retrieval. Michael demonstrated relative strengths in eye/hand coordination and auditory memory.

During Dr. Kloczko's testing Michael cooperated fully, worked very hard, and was able to complete all tasks presented to him. Michael did become fatigued as the testing progressed and yawning, stretching, fidgeting and impulsivity increased. According to Dr. Kloczko, attentional difficulties appeared to impair Michael's performance on a variety of tasks, but his behavior throughout the testing was at no time problematic. Dr. Kloczko felt that while Michael does appear to have attentional difficulties which may very well improve with stimulant medication, the major portion of Michael's behavioral difficulties relate to something other than an attention deficit with hyperactivity disorder, and will therefore need a multifaceted management approach. Medication is only one aspect of that approach.

Since medication has been of minimal benefit in impacting on Michael's behavior, Dr. Koczko suggested trying a lower dose of stimulant medication, targeting specific aspects of attention, concentration, work completion, and vigilance in school rather than problematic behavior. This may provide some improvement in Michael's symptoms of sleep disturbance. Dr. Kloczko suggested substituting Norpramine for Imipramine to diminish the possibility of adverse side effects. According to Dr. Kloczko, Michael will continue to need much one to one attention and supervision in both home and school settings. He will also continue to need therapy to address issues of self esteem, but may also benefit from the addition of cognitive behavioral therapy techniques to help improve insight and control over his impulsive behavior.

Dr. Kloczko noted that children with weaknesses of temporal sequential organization often are poorly organized and confused in the classroom and may have difficulty with task completion because of this. Therefore, attention should be given to helping Michael organize his work and anticipate routines, including possibly the use of notenooks for assignments or instructions, checklists for work utensils, and so forth.

Finally, Dr. Kloczko indicated that since it appears that Michael is "failing" in every setting, it will be important to recognize activities in settings in which he performs well and can feel good about himself. Dr. Kloczko suggested that a closely supervised sports program might allow Michael to utilize his good eye/hand coordination

and balance and to experience success and enjoyment.

Dr. Kloczko's overall recommendations were as follows:

1. To complete his medical evaluation, Michael needs a hearing and vision screen, blood pressure check, and hemoglobin and hematocrit.

2. Michael should be seen by a child psychiatrist to help with the optimal management of his medication. Consideration should be given to decreasing the dose of stimulant medication, targeting in particular signs of attention, fidgetiness, and impulsivity rather than aggressive behavior.

3. Michael will need to remain in a classroom where he can have as much individualized programming and one to one supervision as possible.

4. Because of Michael's mild language difficulties, classroom adjustments should be made, including the use of short direct sentences, repetition of multistep directions, and possibly the listing of instructions or steps on the board or paper.

5. Michael might benefit with assistance in organizing his approach to work through the use of notebooks, checklists, schedules, or stopwatches. In addition it might be helpful for Michael to adopt a fairly regular schedule of awakening, meals, exercise, and sleep, given that his combination of weak time concepts and floating bedtimes leave him feeling very confused.

6. Michael will need to continue in therapy; consideration should be given to adding cognitive behavioral therapy, if he does not already receive this.

21. The Bay State Health Center Team Summary was written by Dr. Susan McQuiston at the conclusion of Michael's evaluations. Dr. MdQuistin indicates that the Team's impressions of Michael are as follows:

1. Normal neurological and physical. Michael has a mild scoliosis requiring monitoring during his growth spurt.

2. Average intellectual potential with evidence of a language-based learning disability.

3. Behavioral and emotional difficulties which suggest a pattern of both attention deficit hyperactivity disorder and conduct disorder. There is evidence of dysphoric mood and question of an affective disorder which should be evaluated more fully.

Dr. McQuiston notes that Michael has not responded sufficiently to a program of behavior modification and medication for behavior

management within the context of a foster home and a substantially separate special needs classroom. According to Dr. McQuiston, the behavioral, educational, and psychological services which have been provided for Michael were appropriate, but not intensive enough to meet Michael's multiple needs. Dr. McQuiston states that a residential placement, such as the one at CSH, represents the next level of intervention which should be attempted with Michael.

22. On March 23, 1989 DSS removed Michael from his foster home and placed him in residential care at CSH. The placement was made prior to the completion of the Bay State evaluations.

23. In April 1989, Michael was evaluated by Dr. Smith, Consulting Psychiatrist to CSH. In his clinical notes, Dr. Smith indicates that Michael is a rather open and engaging youngster, who has a certain quality of sadness and loneliness about him. According to Dr. Smith the fact that two of Michael's foster siblings left the R. home and returned to biological parents resulted in a real breakdown on the part of Michael, with increased distractability, falling apart and acting out.

According to Dr. Smith, Michael has a good memory and a good fund of information. In addition, in Dr. Smith's opinion, Michael has been able to develop some real cognitive skills and is able to conceptualize fairly well. Michael also demonstrates a capacity to be introspective, however, events in his life have taken their toll. Dr. Smith felt that Michael suffers from feelings of worthlessness and does not have enough internal structure, but is still quite capable of using others to sustain his overall functioning. According to Dr. Smith, Michael exhibits restlessness and an inability to deal with tension, and appears to feel somewhat deserted.

Dr. Smith concluded that Michael has attention deficit disorder with underlying feelings of depression and emptiness. Dr. Smith observed that Michael can be quite compliant on one level, but on another level is frightened of tying into others. It is difficult to get close to Michael, although he is eager to be a part of things. In Dr. Smith's opinion, much of Michael's distance and cautiousness comes from his fear of disappointment.

Dr. Smith testified that Michael is difficult to place in a foster setting, because his style wears people out. Michael does not acknowledge the needs of others, is easily enraged, puts people down to enhance his self esteem and expects others to serve him. According to Dr. Smith, a youngster like Michael tends to exhaust foster parents and ends up floating from home to home.

24. On July 25 and 27, 1989, Dr. Louis Gentile, Consulting Psychologist to CSH conducted a psychological evaluation of Michael. Dr. Gentile administered the Roschach Test, Thematic Apperception Test, Bender-Gestalt Test and Draw-A-Picture Test.

During his evaluation with Dr. Gentile, Michael's thinking processes were logical and sequential, his memory functions were intact, and he was oriented to time, place and person. Michael was

guarded when talking about his recent past and had a hard time explaining his family history. Dr. Gentile sensed a significant tone of emptiness, as Michael talked about all the failed relationships with adults in his life. Michael admitted having fights with peers at school and with foster siblings, but denied any conflicts with his foster mother.

The data from the projective tests administered by Dr. Gentile did not reveal any distortions of reality or disturbance in Michael's thinking process. However, Dr. Gentile observed a significant tone of sadness throughout Michael's responses that is associated with being alone, feeling that others do not care about him, and that others are not responsive to his needs. According to Dr. Gentile, this causes feelings of depression and emptiness which are more than Michael can handle. Michael tries to avoid experiencing these feelings by becoming absorbed in intellectualized activities, such as reading.

According to Dr. Gentile, this works for Michael when things are going smoothly and there are no stressful situations facing him. However, once Michael begins to experience pressure, he is quickly overwhelmed by it and responds by lashing out indiscriminately and with such intensity, that he poses a risk to others. Dr. Gentile noted that once it begins, Michael's acting out is out of control and he is driven by the desire to hurt others. Michael has little tolerance for any degree of tension. According to Dr. Gentile, once Michael becomes even mildly upset, it is usually not possible for him to withdraw from the conflict situation, and quiet down. Instead, he needs to confront the situation which results in a pattern of provocative behaviors that escalate the conflict. Of particular concern to Dr. Gentile is the fact that Michael intentionally attempts to hurt others.

Dr. Gentile found that when Michael is passive, his anxiety and vulnerability increase to such a degree that he feels overwhelmed and begins to lose his sense of self. Michael's acting out then becomes extreme. In Dr. Gentile's opinion, as Michael moves into adolescence, he is becoming increasingly sensitive to issues that reflect his self identity such as competition with peers, real or imagined slights from others, conflicts with authority figures and so forth. These situations all become potentially explosive ones for Michael.

Dr. Gentile noted that Michael has experienced a significant amount of emotional deprivation and lack of sustenance. While Michael wants to establish relationships with sustaining adults, he is so vulnerable to the slightest hint of rejection or non-acceptance that he has a hard time letting down his guard and trusting others. On the one hand, if Michael is not nurtured, he feels alone and empty; on the other hand if people get too close, Michael's feelings of rejection get stirred up and he feels overwhelmed and threatened. According to Dr. Gentile, when Michael senses any change in a relationship or has been disappointed because his expectations have not been met, he reacts by lashing out. Dr. Gentile noted that Michael's escalating conflicts in

the foster home occurred at about the time that there was talk of his adoption by his foster mother. This change in the status of their relationship was threatening to Michael and triggered his acting out. Dr. Gentile observed that this was later followed by two foster siblings leaving the home, another major change which intensified Michael's acting out.

In Dr. Gentile's opinion, the volitility and severity of Michael's acting out makes it very unlikely that he can make a successful adjustment to a family living arrangement or a public school setting at this time. According to Dr. Gentile, neither setting is sufficiently structured or designed to cope with acting out of the magnitude displayed by Michael. Michael demands a lot of attention on his own terms, is sensitive to emotional slights, and if things are not going his way he reacts strongly. In Dr. Gentile's opinion, most adults are not geared to constantly dealing with someone as provocative as Michael and would be worn out by him. Consequently, Dr. Gentile believes that a residential treatment facility is the most appropriate setting for Michael. Dr. Gentile recommended that no changes be made in Michael's living arrangement as a resident of CSH. In Dr. Gentile's opinion, despite Michael's acting out, he had settled into the CSH program and was doing well.

Dr. Gentile testified that the only information he had about Michael's academic performance was that Michael was functioning at grade level and was not exhibiting learning problems. Dr. Gentile did not consult with Pittsfield or review Michael's school records from Pittsfield. Dr. Gentile testified that Michael's problems are not academic, but are emotional and behavioral.

25. Michael attended the Kathleen Thornton School at CSH from March through November 1989. During that time period two report cards were issued for Michael and three educational quarterly reports were completed.

The first report card covers the February - June 1989 quarter and the second covers the June - August 1989 quarter. Both cards provide academic evaluations and behavioral evaluations.

Academically, Michael's performance is similar during the two quarters covered. The report cards indicate that Michael was performing at approximately a 6th grade level in reading and spelling, at a 5th grade level in writing, phonics (5.5 second quarter), and number skills, and at a 4th grade level in verbal expression, problem solving (4.5), social studies and science. Michael's progress and effort were graded as unsatisfactory to satisfactory in phonics, verbal expressiion and physical education, and his effort was graded as unsatisfactory to satisfactory in mathematics. All other progress and effort grades were satisfactory during the first quarter. During the second quarter Michael's progress and effort in reading were given a good grade. In addition his effort on field trips improved from unsatisfactory to good.

Both report cards contain behavior evaluations, which grade

Michael in the following areas: Relationship to Peers, Relationship to Adults, General Appearance, General Behavior in Health and Physical Education, and General Behavior. During both quarters, Michael received unsatisfactory grades in everything except "General Appearance," which was graded as satisfactory.

Michael's peer relations are described as poor. The report cards indicate that Michael does not know how to form friendships, constantly engages himself in negative behavior, constantly interrupts and ridicules other students, and at times becomes physically and verbally abusive. In "Relationship to Adults," the report cards state that Michael is seldom in a good mood, has a hard time opening up and expressing himself, is easily frustrated, and explodes and becomes verbally and physically abusive to staff. Michael also lies and refuses to accept responsibility for his actions and needs constant attention from adults. Michael achieved unsatisfactory progress in all areas of "Behavior in Health and Physical Education," including self esteem, peer relations, following directions, self control, and respect for others. Michael's "General Behavior" is described as inconsistent. He can perform well if in a good mood, but too often he is depressed, angry or frustrated and acts out verbally and physically. The report cards indicate that Michael needs clearly defined limits and a strong behavior modification system to function appropriately in class.

26. The educational quarterly reports completed while Michael was attending Kathleen Thornton School also indicate that while Michael was making some academic progress, he was exhibiting severe behavioral difficulties in the classroom. The "current symptoms" listed for Michael include low self esteem, depression, verbal and physical aggression with intent to hurt, manipulative and controlling behavior, stubborn and oppositional lying, impulsivity, and inability to accept responsibility for misbehavior. The reports indicate little if any progress in Michael's behavior. In November of 1989 his classroom teacher, Ms. Goulet, reports that the times when Michael is an attentive hard working student are few and far between. According to Ms. Goulet, during Michael's third quarter at Kathleen Thornton School, he was displaying a negative attitude, constantly complaining, lying, acting verbally aggressive, and physically attacking staff and other students. In November 1989, Michael's health and physical education teacher reports, "Michael has regressed and is extremely volatile." He also reports that Michael's aggressive behavior is a safety issue in class, and that Michael requires direct supervision at all times.

27. Ms. Annelis Goulet, Michael's teacher at Kathleen Thornton School, testified that Michael's classroom contained 6 other students, age 11 to 12 years old, one teacher and one aid. Ms. Goulet's records indicate that in November 1989 Michael's academic performance as compared to the other students was as follows:

STUDENTS:	Michael	A	B	C	D	E	F
SUBJECT	GRADE LEVEL						
Reading	6	8.5	5.5	5.5	3.5	3.5	1.5
Writing	5	7	5	4.5	3	3	1
Phonics	5	7	6	5	3.5	3.5	1.5
Spelling	6	7.5	5	4.5	3	3	1
Penmanship	5.6	5	2	2	4.5	2.5	1.5
Verbal Ex.	4	5.6	5	4	3.5	3	2
Math:							
Number Sheets	5	8	7	4	4.5	2.5	2.5
Prob. Solv.	4.5	7	6	3.5	4	2	2.0
Science	4.5	5	5	5	4.5	4	2
Soc. Studies	4.5	5	5	5	4.5	4	2

Ms. Goulet testified that Michael required a great deal of 1:1 attention, especially in reading and math. According to Ms. Goulet, Michael exhibited behavioral problems in the classroom. At times Michael deliberately tried to hurt others and showed no remorse for his behavior. Michael frequently lied, his behavior scared the other students, and he had no close friends in the classroom.

According to Ms. Goulet, Michael would blow up for no particular reason, and time-outs and restraints were used to control his behavior. Ms. Goulet testified that Michael needed to be restrained between 10 to 45 minutes at a time. Michael had more outbreaks of negative behavior during gym, because it was a less structured class. According to Ms. Goulet, Michael was never left unsupervised.

Ms. Goulet testitied that a point system of behavior management was employed in Michael's class at Kathleen Thornton School. The day was divided into ten minute time slots and points were awarded for positive behaviors (following directions, staying in seat, etc.). Students received prizes or privileges, if they accummulated a certain number of points. Michael's point charts were sent to the cottage each evening and cottage logs were sent to Michael's classroom in the morning. According to Ms. Goulet, a review of Michael's point chart indicates that he did well during the summer program, which was focused more on recreation and less on academics. In September 1989, Michael did well for a few days, then his behavior went downhill. He had to be restrained several times in September and October. The

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point charts indicate that Michael's behavior improved significantly from mid-November through Deceember. Michael's transfer to Mill Pond School at CSH in December 1989 was primarily a result of problems in the cottage setting. Ms. Goulet testified that Michael was doing well in her classroom and could have continued there, however, Michael's size and aggressiveness made it dangerous to keep him in the latency program.

28. Ms. Karen Shaw, assistant teacher in Ms. Goulet's classroom, testified that Michael needed a significant amount of 1:1 attention. According to Ms. Shaw, Michael's behavior fluctuated depending on his mood. Michael typically acted out if under any stress, and he could be argumentative and volatile. Ms. Shaw testified that at times Michael could be calmed down with verbal instruction, or a time out, but frequently his behavior continued to escalate and he needed to be removed from the classroom. Ms. Shaw testified that Michael often asked for help before he read instructions, that she often sat with him through the entire math assignment, and that he became rapidly agitated when she left him. According to Ms. Shaw, Michael's behavior in the classroom included physical and verbal aggression, kicking, hitting, involving other students in his misbehavior, walking out of class, and throwing objects at others. If the cottage log indicated Michael had a bad night, he would receive immediate 1:1 attention in the classroom.

29. Joseph Robitaille, latency program manager at CSH testified that he interviewed Michael prior to his admission to CSH, and saw Michael on a daily basis when he was a resident of the latency program and attending Kathleen Thornton School. Mr. Robitaille testified that while Michael was in the latency program, there were approximately 16 other residents and a child:staff ratio of between 4:1 and 6:1.

According to Mr. Robitaille, the latency program employs a behavior modification progam involving a daily point system and a weekly level system. Residents have specific behavioral goals. Points earned determine the privileges that can be exercised by each resident.

Mr. Robitaille described a variety of behavioral problems exhibited by Michael during his stay in the latency program (March to December 1989). According to Mr. Robitaille, Michael was a chronic liar and was physically aggressive toward staff and peers. In Mr. Robitaille's opinion, Michael made premeditated attempts to hurt people and showed a lack of remorse afterward. Michael was often rejected by older children and preferred to interact with younger children, who he could manipulate. According to Mr. Robitaille, things could go well with Michael, so long as interactions were on a superficial level. As soon as people got close to Michael, he pushed them away with aggressive and rude behavior. Mr. Robitaille testified that over time Michael's social skills deteriorated and his aggressive behavior increased. In Mr. Robitaille's opinion Michael was attempting to avoid rejection on his own merits. Mr. Robitaille testified that Michael was placed on room restriction on a daily basis and had to be physically restrained at least once every other week.

According to Mr. Robitaille, Michael remained guarded and made no gains in his ability to trust enough to address his personal issues. Michael often lashed out with sexual and racial comments. He was usually on the lowest behavioral level, level 3. Mr. Robitaille noted that Michael performed much better in a 1:1 situation than in a group. Over time, group interactions became harder and harder for Michael.

Mr. Robitaille testified that Michael's educational capabilities were quite good and that the reason for his admission had more to do with his behavioral difficulties. Michael was discharged from the latency program and placed in the adolescent program in December 1989, because of increasing concerns that he was a threat to the safety of staff and other residents. According to Mr. Robitaille, Michael was more extreme and more violent than most other residents. The adolescent program at CSH has a smaller number of residents than the latency program and a higher staff:resident ratio.

30. Geraldine French, clinical supervisor at CSH, testified that when Michael was initially placed in CSH he enjoyed a brief "honeymoon period" of relatively good behavior. As time went on his behavior deteriorated. He became assaultive, more easily and quickly agitated, and began lashing out, hitting and screaming for increasingly small reasons. Michael was transferred to the adolescent program in December 1989, because he was getting older, intimidating the younger children in the latency program, exhibiting an increasing level of aggression, and dealing with adolescent issues without the benefit of an adolescent peer group.

Michael's transfer to the adolescent program at CSH involved placement in a new school (Mill Pond School) and exposure to new teachers, new cottage staff and a new therapist. According to Ms. French, Michael's behavior has continued to deteriorate in the adolescent program in both the residence and the classroom. He often requires daily physical restraints. His emotional and behavioral needs have hindered his ability to focus on educational issues. Ms. French testified that Michael is unable to constructively channel his affect and so expresses it behaviorally.

31. Allen Zippin, Director of Education at CSH, testified that when Michael was initially transferred to Mill Pond School, he was placed in a class headed by a male teacher, with students who were between 16 and 17 years old. Within a short time Michael was transferred to a classroom taught by Ms. Cunningham. That class has one teacher and seven students. Michael is still the youngest student in the class but the other students are 14 to 15 years of age. According to Mr. Zippin, Mill Pond School uses a behavioral modification point and level system which is similar to that used at Kathleen Thornton School. Reports are sent between the residence and classroom every day. Mr. Zippin testified that Michael exhibited some acting out behavior at Mill Pond School and required restraints for yelling and kicking. In Mr. Zippin's opinion if Michael were placed in a public school, he would act out and be suspended. Mr.

Zippin testified that Michael needs a 24 hour behavior management program and people who can provide him with security and safety throughout the day.

32. An educational quarterly assessment covering the period November 1989 to January 1990 was prepared by Michael's teacher at Mill Pond School, Ms. Cunningham. Michael achieved a grade B in English; C- in Math, Science and History; B- in Physical Education; and D in Life Skills. His Effort/Attitude is graded as excellent in English, good in math and Physical Education, satisfactory in Science and History, and poor in Life Skills. The quarterly assessment completed by Ms. Cunningham includes an evaluation of Michael's behavioral and social development. The evaluation covers, Self Image, Interpersonal Relations, Self Control and Accepting Responsibility for Behavior. Ms. Cunningham indicates that Michael needs improvement in every area. She reports that Michael's self esteem and frustration tolerance are low. According to Ms. Cunningham, whenever Michael is assigned daily work, he becomes upset, acts out, and complains about not being able to do the work or having done it already. Ms. Cunningham reports that firm and consistent implementation of a behavior management system seems effective with Michael. While Michael's peer relations are described as weak, Ms. Cunningham notes some improvement in ability to play with students and following staff diretions. In Self Control, Ms. Cunningham notes that Michael was able to conform to the rules and limits of the classroom without many acting out sessions. He did have a few episodes of becoming verbally aggressive, throwing pencils and kicking desks, but responded to staff reprimands. According to Ms. Cunningham, Michael tries to argue with limits and restrictions, but accepts the consequences of his behavior, if staff is firm. Michael has to be closely monitored in order for him to complete all assignments thoroughly. Ms. Cunningham notes that Michael has a tendency to hurry through his work, skip sections or use hastily written answers.

The Mill Pond quarterly assessment includes a report by Health and Adapted Physical Education teacher, David Anderson. Mr. Anderson indicates that Michael has demonstrated adequate motor skills with positive growth over the quarter. According to Mr. Anderson, the main areas in which Michael is in need of improvement are interaction with others and social skills.

The quarterly assessment also includes a report on Michael's progress and level of functioning completed by Jim Anderson on February 1, 1990. Mr. Anderson reports that Michael has made a very difficult transition from the latency age program to the adolescent program. According to Mr. Anderson, Michael continues to be on restriction in the adolescent residence for acting out. Mr. Anderson notes that Michael has difficulty interacting with his peers, is aggressive toward staff and peers, and often seeks negative attention. In Mr. Anderson's opinion, Michael has done a poor job controlling his impulses, is highly anxious, and has yet to adjust to his new surroundings. While Michael's behavior in the classroom is slightly better, peer relations and impulse control remain a source of difficulty. Mr. Anderson reports that Michaeel attends therapy regularly, and although he is cooperative, he has not shown much

insight in terms of his own feelings and behavior.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence presented in this matter, I find that Pittsfield has not proposed a program that is reasonably calculated to provide Michael with the maximum feasible educational benefit, and that the Children's Study Home is not the least restrictive setting appropriate for Michael.

I begin with comment on the procedural violations committed by Pittsfield, for they are striking. The evidence indicates that the program prototype Pittsfield recommended for Michael went from a 502.1 during the 1987-1988 academic year to a 502.4 during the 1988-1989 academic year without the benefit of an intervening set of comprehensive evaluations. That transition, however, is not the subject of this appeal. By its own admission, DSS agreed to the 502.4 placement at the Morningside School in the fall of 1988, but requested an independent evaluation. Pittsfield summarily denied this request, overlooking Michael's right to pursue appropriate educational programming and to receive adequate educational services. By the time Pittsfield approved funding for an independent evaluation in February 1989, Michael's behavior had deteriorated to the point where an emergency placement was necessary. DSS placed Michael in residential care prior to the completion of the Bay State evaluations. Pittsfield, in turn, hastily convened a TEAM meeting and proposed an IEP calling for continued placement at Morningside School for the remainder of the 1989-1990 academic year. There is no indication that Pittsfield contacted Bay State or attempted to incorporate even preliminary findings into the educational planning for Michael.

More troubling is the fact that Pittsfield never convened a TEAM meeting and never drafted an IEP for Michael for the 1989-1990 school year. Pittsfield's witnesses offered conflicting testimony as to exactly what program would be appropriate for Michael. Prior to the close of the hearing, the Hearing Officer told Pittsfield that in failing to produce an IEP, it had failed to fulfill its legal obligations to Michael. Pittsfield responded by continuing to disregard the law. It did not convene a TEAM meeting, did not consult with the personnel who were serving Michael or who had evaluated Michael, and did not draft an IEP, for the year in question. Instead, the Special Education Director for Pittsfield sat down by herself and drafted a document that fails to meet the most rudimentary requirements of the special education laws and regulations. These procedural violations alone justify a finding that Pittsfield failed to provide Michael with the free appropriate public education to which he is entitled. It is regretable that a state agency, rather than a parent, filed this appeal. The BSEA has no mechanism by which it can order Pittsfield to pay retroactive reimbursement to DSS, despite the support in the record for such an award.

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Michael's reported "at grade level" performance in Pittsfield, does not make up for Pittsfield's failure to develop an individual education plan geared to this child's acute and varied needs. Michael's serious behavioral difficulties were emerging in the classroom, undoubtedly blocking maximum progress. Classroom adjustments and techniques recommended by evaluators were not incorporated into any plan for Michael. No effort was made to implement a comprehensive behavioral management system in both the home and school, despite Michael's critical need for this. Instead, communication ground to a standstill. In spite of Michael's severe emotional problems, he was not placed in an intensive therapeutic milieu, and was not receiving group or family counseling. Regardless of the locale of placement, and again Pittsfield's witnesses provided conflicting testimony on this, the record indicates that Pittsfield is not able to adequately serve this child.

Still the fact remains that Michael was not removed from foster care for educational reasons, and, in choosing a placement, DSS did not look first to Michael's educational needs. The evidence indicates that DSS placed Michael in a residential setting, primarily because he could no longer be maintained in his foster placement, even with weekend respite care at Key Shelter. In fact, it was unlikely that Key Shelter could continue serving Michael. Michael was becoming an increasing danger to himself and others. Expert witnesses agreed that he needed to be removed from his foster placement. There was pursuasive testimony that it would be difficult to maintain Michael in any foster home, given the severity of his emotional damage and the magnitude of his acting out behavior.

In locating an emergency placement, DSS did not consult with Pittsfield and acted prior to the completion of the Bay State evaluations. The record suggests that the placement selected by DSS, Children's Study Home ("CSH"), did not offer the most appropriate educational program for Michael. The teacher and aide from CSH who testified left the impression that efforts to manage students' behavior in the classroom overshadowed attempts to focus on academic progress. In December 1989 Michael was moved from one classroom at CSH to another primarily because of behavioral difficulties in the cottage setting. His subsequent classroom placement at Mill Pond School proved to be inappropriate, and so he was moved to yet another classroom. While this third classroom placement at CSH possibly contained a more age-appropriate peer group, there is no indication that it was more suited to Michael's substantive educational needs. While Pittsfield and CSH do not have comparable grading systems, it appears that Michael's academic performance has deteriorated since his placement at CSH, while his behavioral difficulties have increased. It is significant that the individual Bay State evaluations do not support a residential placement, but instead recommend a variety of classroom interventions and services which have yet to be implemented for Michael. I must conclude that CSH is an overly-restrictive and inappropriate placement for this bright child.

Michael's intelligence is a clear strength and he is entitled to any and all services needed to ensure him maximum academic success. While DSS continues to be responsible for

locating and funding an appropriate, safe living environment for Michael, Pittsfield is required to provide an educational program suited to Michael's needs. Therefore, Pittsfield shall bear responsibility for a program prototype 502.5 integrated day program. In line with the recommendations of Bay State evaluators and Pittsfield's psychologist, the program shall contain the following components: a) therapeutic milieu, b) small, structured classroom, c) extensive individualized programming and one-to-one supervision, d) classroom adjustments to address Michael's language difficulties (see Gordon and Kloczko recommendations), e) comprehensive behavior modification system, including training in behavioral management for Michael's home caretakers, f) school-home liaison to coordinate communication and ensure consistent structure, g) counseling for Michael and his family, and h) recreational services.

Michael's needs have been neglected for far too long. It is imperative that Pittsfield and DSS put aside past disputes and join hands in an effort to locate the best possible living environment and educational program for Michael.

In addition Michael should be referred for the appointment of an educational advocate (surrogate parent) by the Department of Education as required by state and federal special education laws, to assure that his educational needs are represented in dealings with Pittsfield and DSS. Accordingly, I am forwarding this decision to the Department for this purpose.

ORDER

Pittsfield did not propose an IEP for the 1989-1990 academic year which was reasonably calculated to provide Michael with the maximum feasible educational benefit in the least restrictive setting. Pittsfield shall fund an integrated day program which includes the components outlined in this opinion.

Jane M. Lavoie, Hearing Officer

1/10/91
Date

10/19/90

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Christine H. **BSEA # 89-2124**

DECISION

This decision is written pursuant to 20 U.S.C. 1400 et seq, 29 U.S.C. 794, M.G.L. chs. 30A, 71B, and the Regulations promulgated thereunder.

A hearing in the above-noted matter was convened on June 4, 1990, in North Andover, MA. and thereafter on June 5, 1990, in Quincy, MA, June 12, 1990 (North Andover) and July 18, 1990 (Quincy).

The following persons were present for all or part of the proceedings:

Dennis H.	Parent
Patricia H.	Parent
Barbara Clurman, Esq.	Attorney for Parents
Alex Alexanian	Special Education Administrator, Reading Public Schools
H. Theodore Cohen	Reading Town Counsel
Rosemary McGrath	Teacher, SEEM Collaborative
Cathy Scanlon	Aide
Sharon Checrallah	Assistant Director, SEEM Collaborative
Rosemary Sheehan	Occupational Therapist
Jennifer Gallant	Physical Therapist
Martha Collette	Neuropsychologist
Kathryn Toma	Teacher, St. Colletta's Day School
Paula O'Meara	Teacher, St. Colletts's Day School
Susan Allen	Principal, St. Colletta's Day School
Barbara Hughes	Special Needs Liaison, Reading Public Schools
Diane Bleire	Vision Specialist
Pamela Lindgryn	Speech/Language Therapist
Reece Erlichman	Hearing Officer

ISSUE PRESENTED

Does the 1990-91 IEP proposed for Christine by Reading Public Schools (hereafter RPS) serve to assure her maximum feasible educational development in the least restrictive environment consistent with that goal? If not, does the program available to her at St. Colletta's Day School (hereinafter St. Colletta's) meet said standard?

NOTE: A subsidiary issue in this matter involved parents' allegation that RPS failed to provide Christine Occupational Therapy (hereinafter OT) services as called for by her IEP for more than 3 months during

the 1989-90 academic year. A significant amount of evidence was taken on this issue revealing:

a) that despite good faith efforts to secure an occupational therapist to replace Christine's original therapist (who was on maternity leave), a hiatus in service delivery did occur between December 4, 1989 and March 14, 1990; and b) that parents privately secured the services of an OT for their daughter for a period of the time she was otherwise without services. (Testimony Ms. H., Ms. Boyle, e.g.) During the course of the hearing, RPS agreed to compensate parents for all OT sessions which Christine should have received between 12/4/89 and 3/14/90, at the rate of $75/session for sessions funded privately by parents and at the rate setting rate for the remaining sessions. In light of such agreement, this decision will not address said issue.

PRELIMINARY STATEMENT -PROFILE AND EDUCATIONAL HISTORY

Christine H., age 14, is consistently described by experts as a multihandicapped child, who functions cognitively within the moderate range of mental retardation and who presents with Goldenhar Syndrome, significant visual-perceptual impairments (difficulty tracking, scanning, fixating on materials), cerebral palsy, attendant fine and gross motor delays, and a seizure disorder. She is furthermore a student who is easily distracted and may also engage in non-complaint behaviors. Christine's overall reading skills are assessed at the pre-school level, her arithmetic abilities at the pre-academic level, and her social skills at approximately the 6-8 year old level. Assessment of receptive language abilities range from the 4-5 1/2 year level and expressively, Christine is able to use sentences averaging 4-6 words in length.

[See e.g., Exhs. P-1, S-1, S-32, S-49, S-50; refer to testimony Ms. McGrath, Ms. Lindgryn, Ms. Bleire, e.g.].

Christine's educational history may be summarized as follows. At age 4 she commenced attendance at the SEEM Collaborative pre-school program and she remained a student in the SEEM continuum until June 1982. Thereafter, she was privately placed by her parents at Learning Prep School where she continued in attendance until December 1984. [Note: A BSEA hearing was held on the issue of Christine's placement for 1982-83, and an attendant decision issued in April 1985 (BSEA # 6238), finding the SEEM program appropriate to meet Christine's needs for 1982-83.] Christine returned to SEEM in December 1984 (at the Altavesta School), remained there until June 1987, and entered Ms. McGrath's SEEM class at the Joyce Middle School in September 1987, which placement continued through 1989-90. It should be noted that in August 1988, BSEA decision #88-0807 was issued endorsing Reading's draft IEP for 1988-89 [as amended by the proposed community awareness program, Exh. S-5, and the functional reading program] calling for Chsistine's continued placement at SEEM, and ordering Reading to finalize an IEP incorporating these elements and present it to parents forthwith. (See Exh. S-2, S-6) The IEP proposed by RPS for 1989-90 called for Christine's continued 502.4 prototype placement at SEEM, with the provision of OT, physical therapy (PT), vision therapy, speecn/language therapy, modified

physical education (twice weekly with other members of her class) and a summer program at Camp Paul (Exh. S-32). As this IEP was never accepted by parents, the 1988-89 IEP was implemented for Christine during 1989-90.

The IEP currently proffered by Reading, which has been rejected by parents and is the subject of the instant appeal, is of the 502.4 prototype, covers the period July 1990-June 1991*, and calls for Christine's placement at the SEEM Collaborative class in the Lynnfield Middle School. Additional services include twice weekly occupational, physical, vision, and speech/language therapies, the services of an individual aide (three hours per day) and the consultation services of a behavioral therapist. Twice weekly modified physical education with members of the SEEM class is further recommended. (See Exh. P-2, P-3, S-56.)

STATEMENT OF THE EVIDENCE

Parents' Case

1. Martha Collette (Ph.D., Clinical Psychology; neuropsychologist, Youville Hospital) authored the neuropsychological evaluation report which appears in the record as Exh. P-1, and presented testimony with regard to same. This report was premised on the results of a May 26, 1990 evaluation, conducted by Susan Thompson, M.Ed., as well as Dr. Collette's review of selected records. (It should be noted that Dr. Collette did not administer any tests to Christine, in fact never met her, never spoke to her parents or public school service providers and has neither observed Christine's current nor proposed program).

Dr. Collette testified that Christine is a child who learns slowly, hence at this point in her academic career it is a mistake, and in fact a waste of time, to continue to attempt to teach her academic skills which have been addressed for many years (without much success) and which she cannot manage cognitively or visually. Such instruction is furthermore detrimental because it is something she cannot master and it therefore encourages a negative attitude toward learning in general. In Dr. Collette's view the primary focus of Christine's educational program should be on functional skills, with academics (e.g., reading and math) appropriate to her cognitive level, as a corallary for use within everyday life situations. Based upon her review of the proposed IEP, the opposite would be the case pursuant to the Lynnfield program, that is, the emphasis of the current IEP is largely academic, and functional skills are more of a corallary.

This witness described functional skills as entailing everyday life skills which would enable a person to function in the community (e.g., self-care, independence, appropriate social interaction, control of impulsivity, pre-vocational skills). Dr. Collette stressed the importance of pre-vocational training for Christine, explaining that since she is a slow learner, the sooner she is taught the better,

*The Camp Paul summer program is additionally proposed.

so as so allow sufficient time for development of the skills which will ultimately enable her to function as independently as possible in adult life. Use of a behavior management approach was further recommended in teaching Christine, with the goal of maximizing her attention and cooperation and thus freeing her up to accomplish functional goals.

Dr. Collette testified that she is generally familiar with St. Colletta's reputation for educating multiply-handicapped students and based on this, as well as her review of Exh. P-4 (program description), she feels Christine would benefit from the specialized programming there available.

2. Susan Allen, Principal, St. Colletta's, described her facility as serving moderately to severely developmentally delayed students aged 6-22. St. Colletta's further owns and operates a licensed sheltered workshop.

Ms. Allen testified that programming at St. Colletta's is flexible, hence if a given class program (e.g., Ms. Toma's class, infra, designated for Christine), requires modification in order to better address the needs of a particular student then this would be effectuated. (Cited by way of examples were the possibility of increased home arts periods and reduction of emphasis on reading by scheduling a therapy during one of the class reading periods.)

This witness indicated that St. Colletta's does not have a vision therapist on staff and further that if a 1:1 aide were required for Christine the arrangements for same would have to be negotiated with the LEA.

3. Kathryn Toma (certified special education teacher, St. Colletta's; slated as Christine's teacher should she attend this facility) testified regarding her class and the population served. Ms. Toma described her class as a functional academic program, staffed by herself and an aide. The program focuses on memory skills, telling time, basic math skills, some pre-vocational work, (two afternoons per week* addressing sorting, collating, labelling), handwriting (or fine motor/perceptual skills), and reading (class divided into 2 groups - some students work on phonetics and functional sight words, other strictly functional sight words). Work sheets are used in the class and hand over hand assistance is provided the students when needed. Daily physical education is furnished, speech, occupational and physical therapies are available, students have art one period weekly, home-arts once weekly, grocery shopping/lunch preparation once weekly and community skills once weekly. Students are further permitted to make individual choices vis a vis leisure time activities (e.g., puzzles, tapes, reading). (See schedule, Exh. P-4) With regard to the specialized programs as delineated at Exh. P-4, Ms. Toma testified that her students participate in the recreation program as well as adaptive physical education. She noted however, that with regard to pre-vocational programming, while some students may be at a stage where they could go to the workshop, others receive pre-vocational

*which could be augmented if required for a given student.

training within the classroom (as described above). With regard to behavior modification, Ms. Toma testified that a general program is in place simply to assure that students follow class rules, however if a student required an individual behavioral program one could be developed specifically for such student.

This witness furnished testimony regarding the profiles of the other students slated for her class for 1990-91, which information is summarized below:

[See attached.]

STUDENT	GENDER/DISABILITY	COGNITIVE LEVEL	BEHAVIORS	READING	LANGUAGE	SOCIAL	MATH	ADL
A	M (Down syndrome)	Moderate Retardation	No Problematic Behaviors	Sight Words	Spontaneous Speech but Articulation Problems	Very Social	Can Tell Time To Half Hour, Learning money Skills	Can Dress & Undress Independently
B	M (Infantile Autism)	Moderate to Mild Retardation	No Problematic Behaviors	2nd-3rd Gr. Level Orally but Lower in Comprehension	Good Language Skills	Very Introverted	Uses Calculator for Addition & Subtraction; has Money Skills; Can Tell Time To 1/2 Hour	Can Dress & Undress Independently
C	F	Mildly Retarded	No Problematic Behaviors	2nd Grade Level	Good Language Skills	Very Appropriate Socially	Very Good - 2nd Grade Level	Can Dress & Undress Independently
D	M	Moderately Retarded	Demands a lot of Attention; Teases	Limited Ability	Good Language Skills	Very Social	Knows Numbers Up To 50	Can Dress & Undress

(See also Exh. P-5, IEP's students A-D, and note that students receive pre-vocational Training 4-5 periods weekly and that student C receives home arts twice weekly).

4. Paula O'Meara (certified teacher, moderate special needs) is the home arts teacher at St. Colletta's. She indicated that her class is adapted for non-readers and students with physical disabilities. She further testified that some students do attend her class more than once per week. Ms. O'Meara explained that she has two advanced groups (generally comprised of older students) that attend more often and work at the in-house salad bar or at a food service.

5. Mrs. H., Christine's mother, presented testimony regarding procedural issues as well as her view of Christine's educational needs. She described Christine as a relatively compliant child at home, and testified that in her view, behavioral issues arise at school relative to academic demands. She further testified that she works with Christine on bed making, bathing and dressing skills in the home.

Parent alleged non-compliance by the LEA with certain provisions of Christine's 1989-90 program, including Christine's placement in a mainstream gym class, as opposed to special education gym (adaptive physical education) as called for by her previous IEP, without parental notification or consent. (Parent only became aware of same pursuant to Christine's repeated complaints about gym class, occasioning parental observation.)

In testifying as to the educational program she seeks for her daughter this witness urged emphasis on functional, pre-vocational, ADL and independent living skills rather than on academics which, she argued, have been addressed year after year, without significant success and which are very frustrating for Christine. Mrs. H. further testified that pursuant to her June 1990 observation of the Lynnfield program proposed for next year, the other students in the class are clearly higher functioning than Christine with regard to academic skills.

6. Mr. H., Christine's father, testified as to his concerns with Christine's inappropriate behaviors at school (e.g., hugging), argued that her IEPs are not actually implemented as written, and asserted that many of the skills she has developed over the years are skills which parents have addressed in the home setting.

School's Case

1. Rose Mary McGrath (certified teacher, moderate special needs) is Christine's current teacher, and has taught her at the SEEM Collaborative program since academic 1987-88. Her program, involving 8 developmentally delayed students, ages 10-14, is staffed by herself, a full time aide, a 1/2 time individual aide for Christine and another student. In addressing the relative abilities of her students, Ms. McGrath characterized Christine as approximately third from the bottom in terms of language, reading, math, social and behavioral skills, but lowest functioning with regard to motor skills. (She further noted that only one student from her class will be moving on with Christine to the Lynnfield program next year.)

The witness characterized Christine's program this year, in general terms, as half functional and half academic in focus. Daily individual reading is provided (using the Merrill Linguistic series and the language master; work on "c-v-c" words), in addition to group reading acitivities (functional signs, community words). Functional math is further provided on a daily basis, entailing money, time, counting and calculator skills. One to three periods weekly are devoted to meal preparation/cooking and the class participates in weekly community trips (restaurants, super markets, library). (See Exh. S-57). The program further addresses simulated social situations (role playing), calendar skills, and circle time (e.g., discussions of weekend activities). Students are mainstreamed for art, gym, chorus and lunch and during these times Christine is accompanied by an aide. Christine furthermore receives twice weekly individual OT, PT, and vision therapy as well as small group speech therapy.

In addressing the behavioral component of Christine's program, Ms. McGrath testified that a behavior therapist set up a program for her (initially in November 1988, Exh. S-15) which program was implemented within the classroom.* Based upon her experience with Christine after using this program for a period of time, and in consultation with a behaviorist, the protocol was revised (January 1989) and data was collected (within the classroom setting) pursuant to this revised form. The strategy initially employed to address avoidant behaviors was that of ignoring Christine until she indicated she was ready to work. However, as per this witness, a great deal of time was wasted using this technique and as a result the strategy was modified, i.e., Christine was asked if she was ready to work. In terms of behavioral interventions during academic 1989-1990, Ms. McGrath testified that she devised a consistent behavioral program (which she reviewed in November or December with specialist Luiselli who endorsed same), entailing the targeting of certain negative behaviors (e.g., refusal to work, putting head down) whereby service providers completed sheets indicating whether or not Christine earned a check for given periods of time. Rewards were earned for accrual of a given number of checks. (See Exh. P-7) Ms. McGrath indicated that during the course of the year, other behavioral options were explored, however a program similar to that described above was resumed approximately 1 1/2 months ago.

With regard to the issue of Christine's progress over the year, Ms. McGrath characterized behavior as generally better this year than last (i.e., decrease in non-compliant behavior of refusing to work, putting her head down), her spontaneous language, attention span, ADL, and counting skills as improved, and her social skills as having increased. Christine's current reading level was assessed by

*This witness noted that the program was not implemented during therapy sessions as its purpose was to increase academic proficiency.

this witness to be at the primer* (readiness level) and her functional reading (words such as exit, entrance, emergency) had, in Ms. McGrath's opinion, greatly improved. In terms of functional math Christine still has not mastered the concept of money, nor can she read a clock (despite the fact that this skill has been addressed for sometime), however she can operate a calculator and identify coins and their values, and has improved in her ability to write numbers independently.
[See also progress reports, Exhs. P-11, P-13; and May 1990 evaluation report, Exh. S-55.]

In addressing the issue of programming for next year, Ms. McGrath testified that she recommended Christine move up to the next age level of SEEM Collaborative programming based upon her chronological age. In her opinion the proposed IEP (as revised by Exh. P-3) is appropriate to meet Christine's needs. While representing some increase in functional focus, it is not, as per Ms. McGrath, a major divergence from the programming she has received this year.

When questioned as to the efficacy of increased pre-vocational training for Christine for 1990-91, Ms. McGrath testified that she does not think it is either imperative or advisable that such level of vocational training begin until high school (age 16).

This witness acknowledged that she did not inform parents of the change in Christine's physical education programming from self-contained to mainstream.

2. Cathy Scanlon has been Christine's 1:1 aide since September 1988, working with her within the classroom for at least three hours daily and accompanying her to mainstream classes and community trips.

Ms. Scanlon described a typical day for Christine as involving reading (use of flash cards), math (working with a calculator), snack/free time, group work, lunch (cafeteria), therapies and additional activities. She testified that she assists her with paper-work assignments (time devoted to this varies, some days, 2-3 periods) but that Christine still cannot write her name. In assessing Christine's current status and progress, Ms. Scanlon indicated that Christine does not have difficulty in mainstream classes, that her attention span has increased significantly since September 1989, that her behavior has improved since last year, that she will now initiate play whereas she didn't do this in the past, and further that she now makes fewer negative comments. Ms. Scanlon also noted that Christine has lost interest in using the computer, choosing instead to socialize during her free time.

3. Mary Boyle (occupational therapist, SEEM Collaborative) provided Christine occupational therapy services for 2 1/2 years commencing academic 1987-88, through 11/89. Ms. Boyle described her work with

*McGrath noted that she doesn's necessarily test at this level on standardized tests owing to visual impairment.

Christine during 1988-89 as involving specific pre-vocational task training (e.g., sorting tasks) on a monthly basis, and during 1989-90 every three weeks. She explained, however, that the other skills addressed in OT sessions (e.g., perceptual motor skills) overlap the pre-vocational training. She further testified that she worked with Christine on functional/home skills including laundry, cooking, self-care, bed making and dressing.

In assessing progress during Christine's tenure with her, this witness indicated that slow but steady gains had been achieved in many areas - more specifically noting that (a) writing skills, which had been at the 2-3 year old level in 1987, were between the 5-6 year old level by 11/89; (b) cooking skills had evidenced slow steady gains; (c) Christine could attend to pre-vocational tasks for 15-20 minutes; (d) bed making was inconsistent. With regard to behavior, Ms. Boyle testified that there were some problems early in academic 1988-89, however Christine's behaviors thereafter improved and she performed well in occupational therapy sessions during 1989-90. Given this Ms. Boyle did not utilize behavior data sheets in sessions with Christine. (See also progress reports, Exhs. P-13, S-19, S-36.)

4. Rosemary Sheehan (certified OT) furnished Christine services at SEEM commencing March 20, 1990 and continuing for 15* sessions, addressing certain ADL skills (fastening, snapping), cooking, simple task sorting, manipulative skills (as they relate to fine motor/pre-vocational training) and bedmaking. (Ms. Sheehan indicated that the latter endeavor was unsuccessful as Christine refused to engage in the activity). She further conducted an occupational therapy evaluation of the student (Exh. S-52) which found Christine to demonstrate basic pre-vocational skills such as sorting by color, counting with one to one correspondence and discriminating basic geometric shapes. Poor attention and task persistence, as well as difficulty with more than one step directions was further evidenced.

This witness testified that significant portions of her sessions with Christine were devoted to dealing with her non-compliance (i.e., failure to engage in the designated activity). Ms. Sheehan attributed some of her non-compliance to stress associated with the testing procedure, noting that behaviors improved once testing was completed.

5. Jennifer Gallant (physical therapy assistant) saw Christine weekly for physical therapy sessions during 1989-90. Ms. Gallant testified that in March 1990 she observed Christine in her gym class owing to parental concern regarding the placement. She indicated that at the time of her observation, modifications were in place for Christine within the mainstream class (e.g., presence of her aide; assistance of regular education students; additional teacher assistance as needed) however, subsequent to such observation and ensuing recommendations, additional modifications were made. (See Exh. S-42)

*some of which were devoted to testing, pursuant to her three year re-evaluation.

Ms. Gallant explained that Christine's placement in a regular gym class was the result of a decision that mainstreaming would be beneficial for her and her classmates (socially, in terms of modeling, etc.) as long as modifications were made within the class. Moreover, as noted by this witness, Christine's special motoric needs continued to be addressed through physical therapy. Ms. Gallant indicated that she supports the decision to mainstream Christine, and further that Christine appears to enjoy gym class and has so communicated to her in therapy sessions. [See also Exh. P-8, Ms. Gallant's January 1990 PT progress report; and see Exh. S-51, May 1990 PT evaluation prepared by Ms. Andrews. Refer also to Exh. S-23, a March 1989 A.P.E. assessment conducted by Barbara Higgins in which the examiner found that many of Christine's motor needs were addressed via physical therapy and did not need to be re-addressed in physical education. In addition, those adaptations/modifications made to the existing curriculum by Christine's teachers (to meet her needs and those of her classmates) represented adapted P.E. in the simplest form. Furthermore a strength program designed for Christine would fall within the realm of corrective physical education and would closely resemble the role of the physical therapist. It was thus recommended by Ms. Higgins that Christine did not require additional physical education time away from her classmates (Exh. S-23).]

6. Diane Bleire (vision therapist, holds certification in vision, hearing, severely impaired) has provided Christine vision services for three years. Ms. Bleire testified that Christine has shown improvement in some areas over the time she has worked with her. With regard to behavioral issues this witness indicated that during 1987-88, she encountered alot of difficulty in getting Christine to attend, however, over the years, she has become more cooperative and generally behaviors are not a problem in her sessions. She did note that while distractibility is not an issue with familiar activities, there are certain activities (such as computer, testing sessions) which do engender some avoidance behavior.

In response to questions posed on cross-examination regarding the age appropriateness of materials used in her sessions (e.g., "cats and dogs" to teach Christine matching memory), this witness stated that while more functional themes could be used to teach these skills Christine still seems to relate to the cat and dog theme. (See also Exhs. P-9, S-18, S-28, S-39, S-54, 1988, 1989, 1990 reports prepared by Ms. Bleire.)

7. Pamela Lindgryn (certified speech and language therapist) began working with Christine in December 1984, and most recently (academic 1989-90) saw her twice weekly in small group sessions. She furthermore consults frequently with Christine's teacher and aide and conducted a speech and language evaluation in May 1990, pursuant to the three year re-evaluation process (Exh. S-50).

Ms. Lindgyrn testified that Christine has made definite progress over the past 5 years in intelligibility, spontaneous speech, use of full sentences, initiation of language, comprehending language, following directions and vocabulary. In terms of behavior this witness stated that she experienced some difficulties last year in

getting Christine to speech sessions, however no attention problems or avoidance behaviors were present this year. She thus characterized 1989-90 as a very good year behaviorally. With regard to Christine's speech/language abilities relative to current and potential classmates, Ms. Lindgryn assessed Christine as third from the bottom as compared to present classmates, and indicated that she uses modeling well. Based upon her work with three of the students scheduled to be in Christine's class next year, she offered the following comparative assessment: Student "G" - comparable language peer whose receptive language is slightly higher but articulation poorer than Christine's; Student K - just slightly above her level in speech and language skills; Student L - problems in similar areas however richer vocabulary and more adept at using sentences than Christine, would serve as a good model for her. (See also speech/language reports, Exhs. P-13, S-22, S-29, S-40).

8. Barbara Hughes (special needs liaison from RPS to SEEM) is designated as chairperson in Christine's 1990-1991 IEP, and had her first contact with this case five years ago. With regard to Christine's physical education programming during 1989-90 Ms. Hughes testified that she checked with Christine's special needs teacher over the course of the year regarding her status in mainstream gym, and was informed everything was going well. Upon being informed by parent in February that Christine was unhappy, she personally observed the gym class, spoke to the classroom teacher regarding modifications, requested that the physical therapist observe, and modifications were ultimately made.

9. Sharon Checrallah (Assistant Director, SEEM Collaborative, certified in moderate special needs) testified that she has been involved with Christine's case since 1987, has reviewed the IEPs of all SEEM students and was the final decision maker with regard to selecting the Lynnfield class for Christine for 1990-91. This witness described the components of the Lynnfield program as follows. The class is populated by 12 students (ages 12-15) who are cognitively within the mild to moderate range of retardation, 1 teacher and 1 full time aide.* Out of a 7 period day there are only three periods when all students are present in the classroom at the same time.

In terms of Christine's abilities relative to other students, Ms. Checrallah indicated that Christine would fall approximately 8th or 9th from the top in reading, 7th or 8th in language, 10th in social skills, and at the bottom of the group, with three other students, in writing skills. (See Exh. A).

As per Ms. Checrallah, substantively, the classroom as currently constituted, is approximately 50% academic and 50% functional in nature. However, as SEEM is in the process of re-writing its curriculum for junior and senior high students vis a vis functional, vocational and ADL skills, next year, with implementation of the new

*In addition one student has a half time aide and Christine would have a part time aide.

curriculum, more time will be devoted to functional and community referenced activities, etc. Programming is individualized and class work will focus on functional reading, functional* math (e.g., time, money), functional signs, planning for and participating in community trips, shopping, small group functional activities (e.g., emergency skills, job awareness, attention to task, hygiene, how to order in a restaurant, nutrition, financial planning), leisure activities, home economics (cooking, bed making) at least once per week, library and art (each once per week), group counselling (counsellor works with class as a group on social issues, etc.) and modified gym** (two times per week), during which time the class as a whole is furnished physical education in the gymnasium by the classroom teacher. Students can participate in mainstream or non-mainstream lunch period. Ms. Checrellah testified that while pre-vocational programming per se is not contemplated at this grade level, related areas, such as job awareness, attention to task, etc., are addressed. Further, if a pre-vocational component were specifically written into Christine's IEP, it could be furnished through SEEM. (See also Exh. P-3, revised description of program, characterizing the SEEM class as offering a combination of functional academics, daily living skills, community awareness, and emphasizing effective integration, socialization and self-esteem and concentrating on functional reading, math, pre-vocational, language, personal/social and health and safety skills.)

Ms. Checrellah testified that she visited Ms. Toma's class at St. Colletta's in June 1990 and did not observe anything in that program which could not be provided at SEEM. She added that the she would characterize the lesson she observed as academic in nature and one in which Christine would have had difficulty participating.

10. Pursuant to her three year re-evaluation, Christine was observed within the classroom setting by school psychologist Natalie Jansen on April 30, 1990. Based upon such observation, as well as teacher conference, Ms. Jansen concluded that Christine had made progress in many areas as compared with former observations, to wit: ability to transition, restrain impulsivity, reduce inappropriate behaviors and remain on task. Ms. Jansen noted that while Christine can become stubborn, consistent limit-setting and cues increasingly elicit positive response and compliance. (Exh. S-49)

FINDINGS AND CONCLUSIONS

Christine H. is a child with special needs falling within the purview of 20 U.S.C. 1401 et seq. and M.G.L. Ch. 71B. As such, she is entitled to a free, appropriate public education and an IEP which assures her maximum feasible educational development in the least restrictive environment consistent with that goal. Neither her status or entitlement is in dispute. There is likewise no dispute between the parties as to the nature and extent of her needs. Parent and school experts alike uniformly describe Christine as a developmentally

*although some students work on a conventional math program.
**mainstream gym is also available.

delayed, multiply-handicapped student, who presents with cognitive, visual, motor, language and behavioral deficits; and who, as a result of this unique constellation of needs, is a child who learns very slowly. Consensus in the instant case is even more extensive as both parties are in accord that Christine requires a small, structured, specialized educational program which is functional in nature and which can provide the broad range of therapies which she requires. The dispute in this matter is thus a limited one, relative only to the question of what in fact constitutes an appropriate "functional" program for Christine at this point in her academic career. Parents argue that SEEM has historically (and would continue to so do pursuant to the 1990-91 IEP), placed too much emphasis on academic skill acquisition; that over the years such approach has not only proven unsuccessful (as Christine is unable to master traditional academic skills) but has further resulted in great frustration for her; and that continued emphasis on academics, to the detriment of pre-vocational and functional skill development, is contraindicated for a slow learner such as Christine at this stage of her life. It is further asserted by parents, on a related point, that the peer group in the proposed Lynnfield class is inappropriate for Christine as the students are higher functioning than she with regard to academic skills. Reading responds that Christine has in fact evidenced slow but measureable gains over her tenure in SEEM, that the proffered program is more functional in nature than previous plans and would, in the least restrictive environment available, provide her with the combination of life skills, functional academics, pre-vocational training and therapies appropriate to her needs at this point in her academic career.

It is my determination based upon a preponderance of the evidence presented that the IEP proposed by RPS, incorporating the modifications set forth herein, would serve to assure Christine's maximum feasible educational development in the least restrictive environment consistent with that goal. In reaching this conclusion I make the attendant determination that the program available to Christine at St. Colletta's would in no way be more appropriate to her needs than the SEEM program, that it in fact does not have, on-staff, a vision therapist or individual aide which Christine requires, and further that it would require that she be educated in a more restrictive setting than the Lynnfield program. My analysis follows.

Consideration of Christine's performance and status over the course of recent years within the SEEM Collaborative reveals that while progress has been effectuated in specific areas [e.g., social skills, spontaneous language, intelligibility, ability to transition, restrain impulsivity, reduce inappropriate/non-compliant behaviors, remain on task, ability to write numbers independently, (refer to testimony Ms. McGrath, Lindgyrn, Exh. S-40, e.g.)], the rate of such progress has been slow. This is particularly so with regard to reading and writing skills. That such slow rate of progress is commensurate with Christine's abilities, disabilities, and learning style is not a point of contention between the parties. Given then the fact of Christine's great difficulty in acquiring academic skills and the slow rate at which she learns in general, inquiry must focus

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on whether Reading's proposed program places sufficient emphasis on functional, pre-vocational and life skills so as to enable Christine to learn these skills so vital to her as she moves through adolescence and into adulthood. Based upon the endorsement of experts and professionals who have had experience working with/assessing Christine (testimony Ms. McGrath, e.g., endorsing the IEP), and in the absence of credible counterveiling evidence on point, I conclude that, to a significant degree, it does.

A review of the proposed IEP, considered in tandem with Exh. P-3 and the testimony of SEEM witnesses, evidences that the program devised for Christine is highly functional in nature, entailing focus on social skills, planning/participating in community trips, emergency skills, job awareness, attention span, financial planning, leisure activities, home economics (meal preparation, nutrition), appropriate behaviors, reading of functional signs and functional math. And, as per the testimony of Ms. Checrellah, while the Lynnfield program during 1989-90 was approximately 50% academic and 50% functional in nature, given a re-writing of the SEEM junior and senior high school curriculum, the program as implemented in 1990-91 will devote even greater time to functional and community referenced activities. Looking more specifically now to the academic component of the program, while, as characterized, it is to a great extent functional in nature, questions do arise as to the continuing efficacy of expending significant time addressing traditional reading skills with Christine given that (1) despite years of effort, at age 14 1/2 she remains at the pre-school level in this area, and (2) given her age, the ability to recognize and understand community words/signs is of increased importance (refer to recommendations of Dr. Collette). I would thus direct the TEAM to reconsider the balance between traditional academic reading skills (e.g., work on short vowels within the Merrill Linguistic Program) and functional reading (e.g., community words, survival signs) as reflected by the IEP, with an eye toward increasing the latter to a greater than once weekly basis and lessening emphasis on the former.

It should here be noted that the St. Colletta's program, as initially described by Ms. Toma, would incorporate a similar (if not greater) level of classroom academic work to that delivered via the Lynnfield program. However, upon questioning, St. Colletta's witnesses indicated flexibility in programming should the academic component as initially constituted not prove productive for a given student such as Christine. As such similar degree of flexibility can be built into the Lynnfield program (refer to hearing officer's modifications and the testimony of Ms. Checrellah) no educational justification exists on this basis for placement in the more restrictive private setting.

Consideration will next focus on the issue of pre-vocational programming. As per Ms. Checrellah, while concrete pre-vocational tasks <u>per se</u> are not necessarily addressed within the confines of the substantially separate classroom, related critical skills (such as job awareness, attention to task, social skills) are in fact an important component of the classroom program. Furthermore, as per the IEP under consideration, simple pre-vocational tasks (e.g., sorting, matching,

collating, packaging) would be addressed with Christine within the context of her occupational therapy sessions. In assessing whether the level of pre-vocational training Christine would receive via the proposed IEP is sufficient, great weight must be assigned to the opinions of specialists who have had first hand experience in working with Christine over a period of time (as opposed to the opinion of an evaluator who has never worked with, met, observed or tested the child). And, in the view of such professionals (herein TEAM members McGrath, Sheehan, e.g.) the degree of pre-vocational services as reflected by the IEP is appropriate for Christine at this stage of her development and academic career.

Parent has raised further concerns regarding the amount of time allocated for home economics. Given that the skills taught in home economics are skills which will be important in terms of Christine's ability to function as independently as possible in an adult living situation, and further that such skills have been slow in developing, it would appear reasonable that additional time (i.e., in excess of 1 period per week) should be allocated to this subject matter for Christine. No evidence was adduced to indicate that such increase would be contraindicated. RPS shall therefore amend Christine's program so as to include at least one additional period weekly of training in the home economics area.

During the course of the hearing a great deal of time was devoted to the question of appropriateness of the peers with whom Christine would be placed were she to attend either the Lynnfield or alternate (St. Colletts's) program, as parents expressed concerns regarding the allegedly higher academic capabilities* of the students in the Lynnfield class. As per the testimony of SEEM witnesses, while many of the Lynnfield students would in fact display higher skills in given areas than Christine, others would be more similar in abilities. (Testimony Checrellah, Lindgryn, Exh. A) Furthermore, it must be emphasized that each student's program is individualized, hence services would be delivered to Christine at her own level in each discipline. Moreover, Christine can in fact derive educational benefit from modelling positive role models (testimony Ms. Lindgyrn, e.g.). And finally, when the St. Colletta's peer group is considered, it is evident that many of the students in the class targeted for Christine are certainly performing far more advanced academic tasks than she, (testimony Ms. Toma, Mc. Checrellah) yet this was not an impediment to parents' assertion of the appropriateness of such program. I turn next to a more global look at the St. Colletta's program which would be available to Christine were she to attend that facility.

As described by private school witnesses, the program emerged as strikingly similar to SEEM with regard not only to class composition, but subjects addressed, time allocated to given courses, services delivered and behavioral component. (I note however that St. Colletta's does not have a vision therapist on staff nor the capability of providing a 1:1 aide.) The school does have in place a

*as compared to Christine

workshop which component was not noted as available at Lynnfield. Nevertheless, based upon the testimony of St. Colletta's witnesses, this workshop is not something which would necessarily be a part of Christine's current program given her skill levels at this point in time.

A final discussion is warranted with regard to parents' allegation of procedural non-compliance by RPS vis a vis changing the nature of Christine's physical education services from adaptive physical education to modified, but nevertheless mainstreamed gym, without prior parental consent/notification. While a semantic argument can be made, given the precise wording of the IEP, with regard to modified gym services, the fact of the matter is that the program was changed and parents were not properly informed. For this RPS must be admonished and cautioned regarding stricter compliance to procedural mandates in the future. A copy of this decision shall be forwarded to the Bureau of Program Audit and Assistance for their consideration of this issue. With regard to the provisions of the current IEP as they relate to physical education, the record supports the efficacy of same and no counterveiling evidence was adduced to indicate that a different service delivery model is warranted or desirable.

ORDER

RPS shall modify its proposed IEP in keeping with the terms of this decision and make such program immediately available to Christine H.

Reece Erlichman, Hearing Officer

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7/30/90

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

WILLIAM C. v. BELMONT PUBLIC SCHOOLS **BSEA # 90-0050**

RULING ON APPELLANTS' MOTION FOR RECONSIDERATION

On July 6, 1990, William C. and his parents ("Appellants") filed a Motion for Reconsideration in the above-reference matter. In their motion, Appellants claim that the order issued by the Bureau of Special Education Appeals ("BSEA") on June 22, 1990 should be reconsidered for two reasons. First, Appellants take issue with the following statement contained on page 8 of the order:

> I must caution that, even if parents proceed to a hearing and prove a valid claim under Section 504, it is improbable that the remedy for such a violation would be reimbursement for Carroll School tuition for the 1989-90 school year, absent any right to such reimbursement under the Education of the Handicapped Act., G.L. c. 71B and the regulations promulgated pursuant to those statutes.

Appellants claim that this statement is contrary to law and misconstrues the potential application of section 504 of the Rehabilitation Act of 1973 ("Section 504") to the facts of this case.

Second, Appellants claim that based on arguments they made in memoranda submitted prior to the June 22, 1990 order, as well as on additional documents submitted with their Motion for Reconsideration, the Hearing Officer should find as a matter of law that William C. and his parents resided in Belmont for the 1989-90 school year.

On July 20, 1990 Belmont Public Schools ("Appellee") filed a response to Appellants' Motion for Reconsideration. In its response Appellee disputes the claims raised by Appellants and asks the BSEA to "dismiss parents' Motion for Reconsideration and dismiss this case as to any Section 504 claims forthwith for lack of jurisdiction."

It is clear from their pleadings that the parties have misconstrued the order issued on June 22, 1990. There has been no determination with regard to any potential claim that parents may have under Section 504. The order of June 22,1990 clearly states that the BSEA cannot determine whether or not there is a valid Section 504 claim without a hearing on the material facts, and cannot dismiss such a claim as a matter of law.

Just as there has been no ruling on whether or not there is a valid claim under Section 504, so too there has been no ruling on the scope of the remedy, if any, that would be available if Appellants

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proceed to a hearing and prove a valid Section 504 claim. While I am aware of no court, BSEA or OCR decision ordering tuition reimbursement for a violation of Section 504, absent any right to such reimbursement under the Education of the Handicapped Act, Appellants are free to call any such decision, or for that matter any pertinent law or regulation, to the Hearing Officer's attention, if they choose to proceed to a hearing on a Section 504 claim.

For reasons articulated in paragraph number 3, pages 6-7 of the June 22, 1990 order, there is no need for a finding with respect to the stipulated fact that William C. and his parents resided in Cambridge for the 1989-90 school year.

The order issued on June 22, 1990 is not based on an error of law or a misconstruction of pertinent rules, regulations, policies or procedures.

Appellants' Motion for Reconsideration is **DENIED**.

Hearing Officer

July 20, 1990
Date

8/10/90

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: TOM M. AND THE SUDBURY PUBLIC SCHOOLS BSEA # 90-0297

DECISION ON RESPONDENT'S MOTION TO DISMISS

This matter comes before the Hearing Officer on the Motion of the Sudbury Public Schools to Dismiss the Appeal of the Parents. In its Motion filed on September 20, 1989, Sudbury alleged: 1) that Sudbury was not the local educational agency responsible for Tom's education as it was a K - 8 system which Tom left in June, 1987; 2) that the grounds for appeal were unknown; 3) that Sudbury could not be financially liable for a private school placement unilaterally made by the parents after Tom left the Sudbury school system; 4) that the parents' claim is barred by laches; 5) that the Bureau of Special Education Appeals (BSEA) lacks jurisdiction; and, 6) that the parental claim is speculative and punitive in nature.

On April 19, 1990, the parents filed an Opposition to Sudbury's Motion, stating that the Motion was based on facts not within Sudbury's knowledge, and alleging that Sudbury: 1) failed to inform the M's of their procedural rights; 2) failed to identify or completely evaluate Tom's special needs; and, 3) failed to inform Lincoln-Sudbury of Tom's special education needs. The parents asserted that sufficient facts existed in the record to support a prima facie claim for relief. Because the parties submitted additional documents outside the text of the Motion for the Hearing Officer's consideration, the Motion will be treated as one in the nature of a request for Summary Judgment. Viewing all the facts established in the documents in the light most favorable to the Parents' claims, the Parents have failed to construct a supportable, factual and legal basis upon which their request for relief could be granted. Therefore, the Respondent's Motion to Dismiss is granted.

The facts and the reasoning behind my ruling are set out very briefly below:

1. Tom is a 17 year old student currently attending the Willow Hill School, a private special education school approved by the Commonwealth of Massachusetts.

2. In January, 1982, when Tom was 8 years old, the M's requested a comprehensive special education evaluation through the Sudbury Public Schools. They signed a form acknowledging their consent to various assessments, as well as receipt of documents outlining their procedural rights. (See Exh. P-E). All assessments found Tom to be functioning within the average range. The school issued a finding of no special needs on March 16, 1982. The parents indicated their acceptance of Sudbury's conclusion that Tom did not require special education services, and signed the

evaluation summary on April 6, 1982. (Exh. P-E through P-L).

3. Tom achieved passing grades in all subjects and was promoted from year to year without incident. There is no evidence that the parents ever rescinded their acceptance of Sudbury's finding of no special needs, ever requested another evaluation from Sudbury, or ever indicated to Sudbury that they needed additional information about Tom's learning needs or the services available through Sudbury. There is no evidence that Sudbury requested that Tom be re-evaluated, or that he was experiencing significant learning difficulties that affected his school performance. (See, Parent's Exhibits passim).

4. Tom attended the Sudbury Public Schools through the 8th grade, the 1986-1987 school year. The Sudbury Public Schools include only grades K through 8. After 8th grade Sudbury residents attend the Lincoln-Sudbury Regional School District.

5. In April, 1987, during Tom's 8th grade year, his parents arranged for a private psychoeducational evaluation. The evaluation found Tom to be operating in the average range with excellent verbal, reasoning, and social skills. (Exh. P-S). There is no evidence that the parents requested an evaluation through the Sudbury Public Schools, informed Sudbury of the impending independent evaluation, or shared the results with them. There is no evidence that, as a result of that parent initiated evaluation, the parents requested special education assistance through Sudbury or through the Lincoln-Sudbury Regional School District.

6. In September, 1987, Tom automatically would have transferred school districts by beginning attendance at Lincoln-Sudbury High School in the 9th grade. Instead, Tom was enrolled by his parents at the Willow Hill School. There is no evidence that the parents sought information or assistance concerning the private, unilateral placement at Willow Hill from Sudbury or Lincoln-Sudbury.

7. On February 2, 1989, eighteen months after Tom had "graduated" from the Sudbury Public Schools, parents filed a request for hearing at the Bureau of Special Education Appeals, naming both Sudbury and Lincoln-Sudbury as respondents. On Respondent's Motion for a Protective Order, the Hearing Officer, Phyllis Ryack ruled that the only issues over which the BSEA had jurisdiction arose out of the Individualized Education Plan, (IEP) proposed by Lincoln-Sudbury, covering the period April, 1989 through February, 1990. That ruling effectively dismissed the parents' claim against Sudbury. The parents' claim against Lincoln-Sudbury was later settled by the parties.

8. The parents filed another request for hearing on July 5, 1989, once again naming both Lincoln-Sudbury and Sudbury, as

the responsible local educational agencies. The request was, by chance, automatically assigned to Phyllis Ryack, and subsequently reassigned to Lindsay Byrne. Though it appeared that the parents had refiled a request for hearing based upon the identical grievances at issue in the prior appeal, the parties and the Bureau agreed to consider the parents claims against Sudbury only, in the interests of allowing the parents a full opportunity to air their dispute. The matter was originally set for hearing on July 24, 1989, but was postponed due to a conflict in the Hearing Officer's schedule. The hearing was then set for September 8 and 15, 1989, but postponed by agreement of the parties to permit consideration of Sudbury Public School's Motion to Dismiss.

9. On September 18, 1989, Sudbury submitted a Motion to Dismiss the Parents' Appeal and supportive memorandum. The Motion was set for hearing on October 26, 1989, but postponed at the request of the parents' counsel, who needed additional time to submit a written opposition. The Motion was set again for hearing on November 17, 1989, but again postponed at parents request. On April 19, 1990, with no communication among the participants, since November, 1990, the parents submitted an Affidavit in Opposition to Sudbury's Motion to Dismiss. Sudbury renewed its Motion to Dismiss and moved to strike the parents' Opposition on April 27, 1990. The parties attended a prehearing conference on June 7, 1990. Oral arguments on the Motion and Opposition were scheduled to be heard on July 9, 1990. On July 5, 1990, parents indicated that oral argument would be unnecessary.

These facts lead me to conclude that dismissal of the parents claims against Sudbury is warranted on both substantive and procedural grounds.

Substantively, it is not possible to view Tom's educational history in such a way as to render Sudbury Public Schools financially responsible for a unilateral, private school placement made after Tom had "graduated" from the school system. The parents advance an argument that resembles a claim for "educational malpractice": Tom had a learning disability, while he was a student in the Sudbury Public Schools. Sudbury failed to discover the disability. Sudbury failed to treat the disability. The disability worsened requiring Tom's placement in a specialized private school to meet his many educational needs.

Putting aside for a moment the fact that the BSEA does not have jurisdiction to hear tort cases, and the fact that educational malpractice claims have been viewed with great disfavor in the courts that have entertained them, there is not a scintilla of evidence in the documents submitted by the parents that could reasonably support their claim. There is no evidence of a learning disability that impeded Tom's progress in his regular education classes, either in Sudbury's assessments, Tom's school records, or the parents' own

evaluation. There is no evidence that there were signs or indications of such a disability that Sudbury ignored or failed to properly consider. There is no evidence of a decline in school functioning during Tom's years of attendance at Sudbury. On the contrary, the evaluations performed five years apart, by public and private evaluators, showing remarkably similar results, found Tom to be an average student performing equivalent with his abilities. In sum, the evidence could not, under any reasonable interpretation, support a finding that Tom demonstrated a learning disability that Sudbury knew, or reasonably should have known, to exist, that Sudbury failed to take appropriate action, and that, as a result, Tom's disability worsened to the extent that placement in the most educationally restrictive of environments was the sole option for appropriate intervention. (See, Ch. 766, Reg. 502.5). It is a novel argument, but one which is wholly unsubstantiated in the record.

Procedurally as well, the parents' claims fail. First they argue that they were unaware of their Ch. 766 rights and remedies and that, had they been aware, they would have pursued their options more diligently. The record shows that as early as 1982, the parents were sent documents concerning their special education procedural rights and acknowledged the receipt thereof. (See, Exh. P-E). While counsel argued that the parents would testify that they never actually received notices of their procedural rights from Sudbury, this is where the traditional "best evidence" rule would weigh heavily against testimony concerning events that transpired more than eight years ago.

Next, the parents contend that Sudbury failed to inform Lincoln-Sudbury of Tom's special education needs, as he transitioned from the Sudbury to the Lincoln-Sudbury School District in 1987, giving rise to Lincoln-Sudbury's failure to offer an appropriate IEP, and the parents' foreshortened claim for retroactive reimbursement of private tuition. This claim is equally without merit. There is no evidence that in the spring of 1987 the parents or Sudbury believed Tom to be a student with special education needs. Thus, there was no factual basis for so informing Lincoln-Sudbury. Indeed, had Sudbury conveyed incorrect information to Lincoln-Sudbury concerning Tom's special education status, there would be a basis for an appeal under the Student Record Regulations, 603 C.M.R. s. 23.00.

The fact that the parents' procedural due process rights under Ch. 766 and P. L. 94-142 first arose, and were unexercised, more than seven years before the request for hearing, lends support to Sudbury's argument that the parents' BSEA appeal should be dismissed for laches. Certainly the passage of seven years, with the concommitant changes in personnel, fading of memories, purging of records, along with the omni-present danger of 20/20 hindsight, between the time parental due process rights first attached in this matter, and the time they were exercised, amply fulfills the criteria for determining that laches bars the claim. Both unreasonable delay on the part of the parents, and prejudice to the respondent, exist in these circumstances. Even under the more liberal statutes of limitations pertaining to tort and contract actions, this appeal would be barred. In the context of the special education appeals process, the thrust of which is forward planning to meet the on-going needs of the student (not the

convenience of the parents), time frames for action on the part of school systems, administrative appeals officers, and parents are short. Special Education regulations emphasize quick reaction, so as to maximize the child's opportunity to benefit from the educational program decided upon. Seven years is not quick, and neither under these circumstances, is it reasonable. Even if one were to take the parental claim last in time, the allegation that Sudbury failed to inform Lincoln-Sudbury of Tom's educational needs in 1987, and view it as established, the two years between the time of the event complained of, and the request for hearing, with the intervening parental inaction, change in school systems, and total lack of communication among parties, potentially and actually interested in Tom's education, would be a delay sufficient to support a laches defense.

After careful consideration of all the evidence submitted and the arguments of counsel for both parties, it is my determination that the parents' claims against the Sudbury Public Schools have no basis in fact and are legally unsupportable under any currently accepted special education doctrines. In addition, I find that even were I to take the parents' factual claims as established, they would be barred by laches.

Before closing, I must note that in the context of this special education appeal, I found the conduct of parents' counsel disturbing. At each juncture there were mischaracterizations of applicable law, prior BSEA rulings, and available facts. Furthermore, there were repeated unjustified attacks on the professional conduct and personal integrity of Sudbury school personnel and opposing counsel. In a process that encourages open communication, shared information, and creative problem solving, in order to truly address the individual circumstances of the student, I found parents' counsel's style counterproductive at best. It is to be hoped that, should further action be required in this matter, the unique setting and goals of the special education appeals process would guide the conduct of the parties.

Lindsay Byrne (KRA)
Lindsay Byrne
Hearing Officer

August 10, 1990
Date

42-50

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

JAN 17 1991

In re: Tom. M. **BSEA # 90-0297**

TENTATIVE DECISION ON PARENTS' MOTION FOR RECONSIDERATION

This matter comes before me on the Motion for Reconsideration filed by Tom. M. and his Parents, challenging the Decision of Hearing Officer, Lindsay Byrne, dismissing their claims under M.G.L. c.71B (Chapter 766 and the Education for the Handicapped Act (EHA),* 20 U.S.C. s. 1400 et seq. That decision was issued on August 10, 1990. The Student and Parents' Motion for Reconsideration was filed on September 17, 1990, and the Supporting Application for Reconsideration was received on October 29, 1990. Sudbury Public Schools Opposition was filed on November 14, 1990.** Parents and Student assigned as the basis for the motion the following grounds:

1. Alleged mistakes of fact involving the educational status of Tom M, as of Spring 1987.

2. Purported legal errors arising from the Hearing Officer's refusal to award retroactive reimbursement to the M's for alleged post procedural violations.

3. Purported error stemming from bifurcation of Student's and Parents' prospective claims against Lincoln-Sudbury Regional School District from the retroactive claims against the Sudbury Public Schools.

4. Allegations of supposed bias and collusion between the Hearing Officer and "local school authorities."

After review of the record and due consideration, I conclude that there is no legal support for the Parents' and Student's position, and their motion for Reconsideration should be denied.

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*The EHA was renamed the Individuals with Disabilities Education Act (IDEA) on October 30, 1990, in P.L. 101-476.

**Parents' request for assignment of a new hearing officer to decide this matter led to assignment of Kristen Reasoner Apgar to hear this Motion.

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My reasoning is as follows:

The gravaman of Parents' complaint is that they are entitled to receive reimbursement from the Sudbury Public Schools for a unilateral placement they made for Tom at the Willow Hill School in September 1987, following completion of Tom's attendance in grade eight of the Sudbury School District. The Willow Hill School is a private special education school approved by the Massachusetts Department of Education. The Sudbury School District consists of grades K through 8. Parental placement of Tom M. occurred in place of his entrance into Lincoln-Sudbury Regional School District, which consists of grades 9 through 12 and is a separate school district from Sudbury.

Another BSEA proceeding, BSEA No. 89-1211, addressed the M's claims against Lincoln-Sudbury Regional School District, and resolved those claims. The hearing officer in BSEA No. 89-1211 declined consideration of Parents' and Student's claims against the Sudbury Public Schools.

Parents first challenged the provision of educational services to their son by the Sudbury Public Schools through initiation of their hearing requests filed with the Bureau in February 1989. Tom M. was in regular education programs at Sudbury at all times prior to his completion of grade eight. In January 1982, at the M's request Sudbury conducted a special education evaluation of Tom, making a finding of no special needs on March 16, 1982. This was accepted by the M's, as evidenced by their signature, dated April 6, 1982, on the notification. The M's made no other requests for special education evaluations or assistance of Sudbury, and Tom completed his education in the Sudbury Public Schools in June 1987, having passed his subjects. (See, Parents' Exhibits P-E through P-K; P-M through P-O).

Neither the EHA, nor Chapter 766 presume that a child has special needs absent such a finding pursuant to a multidisciplinary TEAM evaluation. See, M.G.L. c. 71B, s 3. 34 C.F.R. 300.504-505; 300.531-533. When there is a dispute regarding the identification, evaluation or placement of a disabled child, then parents may utilize the due process procedures to challenge such determination 20 U.S.C. s 1415. Here, the M's did not challenge, and, indeed, indicated their acceptance of Sudbury's determination that their son did not have special needs in April 1982. Nor did they in any other way put Sudbury on notice of their disatisfaction of Tom's educational program during the remainder of his school years in the Sudbury Public Schools. Even when viewed in the light most favorable to the M's, there is no credible evidence of procedural violation by the Sudbury Public Schools, which could give rise to liability for a reimbursement claim pressed several years later.

To the contrary there is judicial support for the proposition that the parents must press their claims for special education in a timely manner or the claims will be deemed to be

waived. See, Lewisville Independent School District v. Brook P., 16 EHLR 1313 (E.D. Tex. 1990); Garland Independent School District v. Wilks, 657 F. Supp. 1163, 1167 (N. D. Tex. 1987). Conversely, the M's can point to no legal authority for the proposition that a school district has a continuing unspecified liability for services provided to a student, simply because at a later time he is identified as in need of special education.

Finally, despite the M's unsupported assertions that they would have faired better in asserting their legal claims against Sudbury, if they had been permitted to proceed simultaneously against it and the Lincoln-Sudbury Regional School District, the M's present no credible evidence that their reimbursement claim has not been fairly adjudicated or of bias on the part of the original hearing officer.

Accordingly, the M's Motion for Reconsideration is denied. Because I did not serve as the original hearing officer in this matter, pursuant to G.L. c. 30A, s 12, this ruling is issued as a tentative decision. Parties have fifteen (15) days in which to respond in writing, at which time a final decision on the Motion for Reconsideration will be issued.

by the Hearing Officer:

Kristen Reasoner Apgar

Kristen Reasoner Apgar

Date: January 17, 1991

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MAR 18 1991

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: TOM M. **BSEA # 90-0297**

DECISION OF PARENTS' MOTION FOR RECONSIDERATION

This matter comes before me on the Motion for Reconsideration filed by Tom M. and his Parents, challenging the Decision of Hearing Officer, Lindsay Byrne, dismissing their claims under M.G.L. c.71B (Chapter 766 and the Education for the Handicapped Act (EHA),* 20 U.S.C. s. 1400 et seq. That decision was issued on August 10, 1990. The Student and Parents' Motion for Reconsideration was filed on September 17, 1990, and the Supporting Application for Reconsideration was received on October 29, 1990. Sudbury Public Schools Opposition was filed on November 14, 1990.** On January 17, 1991, in a Tentative Decision I concluded that there was no legal basis for reconsideration of the Hearing Officer's August 10, 1990 decision.

Because I did not serve as the original hearing officer in this matter, the decision of January 17, 1991 was issued as a Tentative Decision. The parties were given fifteen days from receipt of the decision to respond, subsequently extended through February 19, 1991. On February 19, 1991 Mr. M. filed a response to the Tentative Decision. Parents and Student assigned as the basis for the motion the following grounds:

1. Alleged mistakes of fact involving the educational status of Tom M., as of Spring 1987.

2. Purported legal errors arising from the Hearing Officer's refusal to award retroactive reimbursement to the M.'s for alleged post procedural violations.

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*The EHA was renamed the Individuals with Disabilities Education Act (IDEA) on October 30, 1990, in P.L. 101-476.

**Parents' request for assignment of a new hearing officer to decide this matter led to assignment of Kristen Reasoner Apgar to hear this Motion.

3. Purported error stemming from bifurcation of Student's and Parents' prospective claims against Lincoln-Sudbury Regional School District from the retroactive claims against the Sudbury Public Schools.

4. Allegations of supposed bias and collusion between the Hearing Officer and "local school authorities."

After review of the record and due consideration, I conclude that there is no legal support for the Parents' and Student's position, and their motion for Reconsideration should be denied.

My reasoning is as follows:

The gravaman of Parents' complaint is that they are entitled to receive reimbursement from the Sudbury Public Schools for a unilateral placement they made for Tom at the Willow Hill School in September 1987, following completion of Tom's attendance in grade eight of the Sudbury School District. The Willow Hill School is a private special education school approved by the Massachusetts Department of Education. The Sudbury School District consists of grades K through 8. Parental placement of Tom M. occurred in place of his entrance into Lincoln-Sudbury Regional School District, which consists of grades 9 through 12 and is a separate school district from Sudbury.

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Parents first challenged the provision of educational services to their son by the Sudbury Public Schools through initiation of their hearing requests filed with the Bureau in February 1989. Tom M. was in regular education programs at Sudbury at all times prior to his completion of grade eight. In January 1982, at the M.'s request Sudbury conducted a special education evaluation of Tom, making a finding of no special needs on March 16, 1982. This was accepted by the M.'s, as evidenced by their signature, dated April 6, 1982, on the notification. The M.'s made no other requests for special education evaluations or assistance of Sudbury, and Tom completed his education in the Sudbury Public Schools in June 1987, having passed his subjects. (See, Parents' Exhibits P-E through P-K; P-M through P-O).

Neither the IDEA, nor Chapter 766 presume that a child has special needs absent such a finding pursuant to a multidisciplinary TEAM evaluation. Seem M.G.L. c.71B, S 3.34 C.F.R. 300.504-505; 300.531-533. When there is a dispute regarding the identification, evaluation or placement of a disabled child, then parents may utilize the due process procedures to challenge such determination 20 U.S.C. s. 1415. Here, the M.'s did not challenge, and, indeed, indicated their

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acceptance of Sudbury's determination that their son did not have special needs in April 1982. Nor did they in any other way put Sudbury on notice of their dissatisfaction of Tom's educational program during the remainder of his school years in the Sudbury Public Schools. Even when viewed in the light most favorable to the M.'s, there is no credible evidence of procedural violation by the Sudbury Public Schools, which could give rise to liability for a reimbursement claim pressed several years later.

To the contrary there is judicial support for the proposition that the parents must press their claims for special education in a timely manner or the claims will be deemed to be waived. See, Lewisville Independent School District v. Brook P., 16 EHLR 1313 (E.D. Tex. 1990); Garland Independent School District v. Wilks, 657 F. Supp. 1163, 1167 (N.D. Tex. 1987). Conversely, the M.'s can point to no legal authority for the proposition that a school district has a continuing unspecified liability for services provided to a student, simply because at a later time he is identified as in need of special education.

Finally, despite the M.'s assertions that they would have faired better in asserting their legal claims against Sudbury, if they had been permitted to proceed simultaneously against it and the Lincoln-Sudbury Regional School District, the M.'s present no credible evidence that their reimbursement claim has not been fairly adjudicated pursuant to correct legal standards or of bias on the part of the original hearing officer.

by the Hearing Officer:

Kristen Reasoner Apgar

Kristen Reasoner Apgar

Date: March 18, 1991

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

Sean M. and the Amherst-Pelham Regional School District

BSEA # 90-0825

AUG 31 199[illegible]

INTERIM DECISION

This decision is issued pursuant to M.G.L. ch. 15, 30A, and 71B, 20 U.S.C. 1401-1461, 29 U.S.C. 794, and the regulations promulgated under those statutes. The parties requested the Bureau of Special Education Appeals to determine an emergency placement for Sean for the imminent 1990-1991 school year, pending a full hearing on the merits. The hearing was convened on August 31, 1990, at the offices of Burres, Fidnick, Sheppard & Booth in Amherst, MA. Both parties were represented by attorneys. The official record of the hearing consists of a joint document package labelled J-1 through J-17 (with number 6 omitted), and approximately 3 hours of recorded oral testimony.

The issue presented for decision is which of the proposed placements, the 502.3 program at the Amherst-Pelham Regional High School, or the private special education services offered by the Lankmark School, would constitute the least restrictive, most appropriate interim educational setting for Sean?

After careful consideration of all the evidence presented at this emergency hearing, and the arguments of counsel for both parties, it is my determination that a preponderance of the evidence supports Sean's continued placement within the Amherst-Pelham Regional Schools. While I recognize that the evidentiary record may be incomplete at this point, I am convinced that the 1990-1991 IEP proposed for Sean should be implemented pending a full hearing. In reaching this conclusion I rely particularly on the facts that 1.) Sean achieved better than mere passing grades in last year's similar special education/regular education program (Ex. 4); 2.) Testing results obtained during Sean's summer program at Landmark reveal him to be achieving near or above his intended grade placement (Ex. 2); 3.) The IEP proposed for 1990-1991 offers a daily individual tutorial session identified by the parties as being particularly helpful for Sean; 4.) The Amherst-Pelham proposal designates one teacher to provide and supervise all of Sean's educational services, minimizing the risks of fragmentation and miscommunication (Ex. 1, 15); 5.) The Amherst-Pelham proposal provides for supportive regular education assistance in the areas of math, social studies, and counseling (Seppala); 6.) The Amherst-Pelham proposal is less restrictive than the Landmark program while still providing the recommended special education services.

The dispute here centers on the program "model" argued to be most effective in remediating Sean's learning disabilities. I find that there is insufficient evidence in the record to establish the efficacy of one education delivery model over another. Furthermore I am not pursuaded that the parents have established that Sean cannot make

effective progress, with the use of supplementary aids and services, in the regular education setting so as to warrant placement in the most restrictive of day educational settings. See Ch. 766 Reg. 502.5.

Therefore I find that the 502.3 IEP proposed for Sean's 1990-1991 school year by Amherst-Pelham is the least restrictive, appropriate program for him at this time, and should be implemented forthwith.

Lindsay Byrne

Lindsay Byrne, Hearing Officer

August 31, 1990

11/2/90

In re: Tara G. BSEA #90-0985

DECISION

This decision is rendered pursuant to Massachusetts General Laws, Ch. 71B, 30A, P. L. 94-142, and to the regulations promulgated pursuant to such statutes. A hearing on the above numbered case was held at the Central Office of the Department of Education, 1385 Hancock Street, Quincy, MA, and the Brookline City Hall, 1000 Washington Street, Brookline, MA. on May 24, 30, June 1, 5, 7, 25, 28, 29, July 2, 3, 9, and 13, 1990. At the request of both parties, the record remained open until August 22, 1990 for receipt of closing arguments.

Persons present for part or all of the hearing were:

Mr. and Mrs. G.	Parents of Tara G.
Peter Finn	Attorney for Tara and her parents
Nancy Rosoff	Director, Learning Prep School
Constance Lapointe	Supervisor of Reading/Social Studies, Learning Prep School
Clare O'Callaghan	Independent Neuropsychologist/former therapist
Vickie Charlton	Special Education Administrator, Brookline Public Schools
Ellen Michelman	Special Education Administrator, Brookline Public Schools
Sara Wilson	Attorney for the Brookline Public Schools
Kimberly Oram	Special Needs teacher, Brookline Public Schools
Amy Curcio	Teacher Aide, Brookline Public Schools
Carolyn Artin	Teacher Aide, Brookline Public Schools
Stephen Litwack	Psychologist, Brookline Public Schools
Valorie Bouvier Masak	Speech/Language Pathologist, Brookline Public Schools
Marilyn Engelman	Learning Disabilities Specialist
Ellen MacLean	Special Needs teacher, Brookline Public Schools
C. Janey	Court Reporter
Linda Spara	Court Reporter
Michael Jajdel	Court Reporter
A. O'Mally	Court Reporter
Debbie Snider	Court Reporter
Jill Benjoya	Court Reporter
Aida Medeiros	Court Reporter
Marilyn Murtone	Court Reporter
Sandra Sherwood	BSEA Hearing Officer

ISSUES

1. Whether the proposed 1989-1990 IEP calling for a 502.4 prototype placement at the Brookline Public School's Baker School, (hereafter, Brookline) provides an educational program which would maximize Tara's educational development in the least restrictive setting; if not,

2. Whether the Learning Prep School, (hereafter, LPS), a Chapter 766 approved private day school in Newton, MA provides a 1989-1990 educational program which maximizes her educational development in the least restrictive setting.

STATEMENT OF THE FACTS

1. Tara is a 14 year old student who has some cognitive deficits. Her comparative strengths lie in the verbal reasoning and comprehension abilities. Her deficits are more severely compromised in the right hemisphere, impeding her visual/spatial skills and her integration of verbal material. Her WISC score places her in the mentally deficient range, although the verbal score was just below the borderline category. (Exh. S18, S49a, P5) Her academic skills are approximately at the third to fifth grade range, with some dispute between the evaluators. (Testimony of O'Callaghan, Lapointe, Exh. S18, S5) Tara also has social emotional problems; she sees herself as damaged and therefore has low self-esteem; she fears rejection and handles this by being passive and withdrawn from peers; she has difficulty interpreting nonverbal cues and in initiating verbal interaction. (Exh. S18, P5, Testimony of O'Callaghan, Litwack)

2. Tara has attended the Brookline Public Schools (hereafter, Brookline) special education program since she was five years old through her sixth grade. Tara's parents were first concerned about Tara's educational placement in the 1987-1988 fifth grade, where she was receiving special education as well as regular education academic services in science, newsgame, physical education, and unified arts and computers. (Exh. S5, S6) The gap between Tara and her regular education peers widened; she became more defiant and less secure about her abilities; her social skills were poor. (Testimony of O'Callaghan)

Tara's 1988-1989 sixth grade placement again concerned the parents, for they perceived Tara as continuing to have self-esteem issues around her inability to keep up wtih her regular education sixth grade peers. Tara was very withdrawn. The parents had concerns regarding Tar's continued mainstreaming in social studies and science, but at the advice of Brookline, they agreed to it. (Testimonoy of Mrs. G.) Tara received many D's and E's in these mainstreamed classes - approximately 25 between September, 1988 - January 1989. (Testimony of Mrs. G., Ms. MacLean, Exh. P48) She also had great difficulty doing her science homework and was frustrated and would cry at home. (Testimony of O'Callaghan, Mrs. G). Because of the difficulties

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with the academic mainstreaming, it was terminated by the end of February, 1989.

4. In January, 1989, the parents obtained an independent evaluation from Dr. O'Callaghan who had previously tested Tara in 1984 and 1986, and who had provided therapy to Tara for many years. She reported that Tara had acquired the third grade level skills in decoding and spelling, reading comprehension. Her attentional skills, although improved, were significantly below age expectation. Her language acquisition was developing at a fairly good rate. Her social skills were closer to age-appropriate than previously tested. She appeared less anxious than in the past, except when challenged- then she became more oppositional and avoidant. Dr. O'Callaghan stated in her recommendation that it was debatable whether she should continue to try mainstreamed environment, or whether now was the time to transfer her to a school for learning disabled students - eventually focusing on a vocational program. This statement was made in light of Tara's need to feel less different and stigmatized. (Testimony of Dr. O'Callaghan). In her report, Dr. O'Callaghan stated that Tara needed an individualized and substantially separate program which would make math more concrete, and reading and language arts should be enhanced by writing with self-expression encouraged, group therapy, and psychotherapy. (Exh. S18, P5)

5. In April, 1989, Brookline proposed a 1989-1990 seventh grade IEP calling for a 502.4 prototype placement at the Baker School in Ms. Oram's class. Here, she would receive all her academics in the special education class, that being math, reading, spelling, social studies, science, writing, adaptive physical education, literature, critical thinking, In the News, and vocabulary. She would also receive computer and class meetings in this class. Finally, she would be mainstreamed for phsycial education, unifed arts, and special activities. (Exh. S5) The class is taught by a teacher and two aides. The speech/language therapist works with the students once/week and consults with the teacher formally, once/week, and informally, daily. The school psychologist likewise works with the students once/week and consults with the teacher. There are 12 students (including Tara) in this class, all who have some cognitive deficits, generally in the low average range, and who function generally at the third - fifth grade level. (Testimony of Oram, School's Answers to Interrogatories #2)

In July, 1989, the parents postponed their decision regarding the proposed IEP in order to evaluate Tara in a different school setting - LPS - to see if she would be more comfortable with children more like herself. The Baker School placement was held open for her if she should return. (Exh. S3, S5).

On November, 29, 1989, the parents rejected the proposed IEP and continued placing Tara at LPS. (Exh. S2) On February 5, 1990, the parents requested a BSEA hearing.

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6. At LPS, Tara receives reading, math, language, each 5 x week; study skills 4 x week, science and art and speech therapy 2 x week;, horticulture4 x week, physical education 2 x week, and human adjustment 1 x week. (Parents' Answer to Interrogatories #1) All work is taught in small groups of approximately eight students, one teacher. Because the students are grouped according to skill level and learning style, the teacher can provide the direct teaching. The program offers a highly structured, language based curriculum which coordinates not only the teaching methods but the language being taught in the various subjects. (Testimony of Ms. Rosoff, Lapointe)

7. The parents' position is that Brookline's proposed program fails to provide the language based curriculum, the direct teaching, and the appropriate peer grouping for Tara. They also assert that the program is inappropriate in that it is within a regular education school building which is not good for Tara. They assert that the program is similar to the previous fifth and sixth grade programs in which Tara made insufficient progress, especially in the verbal area. (Testimony of Mrs. G., Parents' Answers to Interrogatories #3) Finally, they assert that the class is taught in part by aides, and that such teaching by unqualified staff not only fails to provide for Tara's special education needs, but also violates the law. (Parents' Brief) The parents assert that LPS provides the necessary language based, highly structured program in a homogeneous setting so necessary for Tara to maximize her educational development. They assert that Tara has many friends at LPS and feel supported there. (Testimony of Mrs. G.)

8. Brookline's position is that its proposed IEP offers a highly supportive, well run program taught by a highly qualified teacher and assisted by enthusiastic aides. Further, the program provides an individualized language-based academic program with appropriate peers. Finally, the limited mainstreaming is available and desirable for Tara. (Testimony of Oram, Charlton, Michaelman, Litwack, MacLean) Brookline's position as to LPS is that it is too rigid to allow for individual differences among the students. Also, they assert that Tara is doing no better at LPS than she did at Brookline. (Testimony of MacLean, Charlton, School's Brief)

9. At the hearing, the parents presented evidence regarding several alleged procedural violations. They assert that Brookline provides services differently than stated on the IEP's of students in Ms. Oram's class. That is, a) the number of hours of special education stated on the IEP's differ from the number of hours actually provided; and b) classes not listed on the IEP's are provided, thereby teaching without goals and objectives. They also assert that the Special Education Administrator is not properly certified. (Parents' Brief)

Brookline asserts that these assertions either do not amount to violations of federal or state law and/or that the violations

do not impact on Tara's education or Tara's legal rights, and are therefore not outcome determinitive and should carry no weight in deciding on the issue of Tara's education placement and the parents' right to reimbursement for tuition at LPS. (Brookline's Brief)

FINDINGS AND CONCLUSIONS

I. I find that Brookline's proposed 1989-1990 IEP calling for a 502.4 prototype placement for Tara G. maximized Tara's opportunity for educational development in the least restrictive setting, as follows:

1. The parties were in substantial agreement as to Tara's educational needs, ie, that she requires a language based program with a high degree of structure, tailored to Tara's skill levels, with a strong focus also on Tara's socialization skills and self-esteem issues. The parties disagreed as to which school - the Baker School in Brookline, or LPS in Newton, best provided for Tara's needs. The parties further disagreed as to Tara's expected level of progress.

A major focus in this case centers around Tara's cognitive abilities, her potential for academic progress, and whether she has achieved appropriate progress commensurate with her cognitive abilities in Brookline's previous program and would thereby achieve appropriate progress in a similarly proposed program. After carefully weighing the evidence presented by both sides regarding Tara's WISC scores, her achievement test scores, her emotional profile, her ability to attend, I find the evidence to support at best a conclusion that Tara`s expected progress cannot be pinpointed. There is evidence that she has tested over a span of six years to be functioning at the mentally deficient range, that a one year progress over three year time span is appropriate for such level of functioning, that her reading and language skills are at a level higher than expected, as seen by the percentage scores, and that the lower math scores are as expected, given her lower performance test scores on the WISC. On the other hand, there is evidence that the WISC scores reflect some low average abilities, especially in the verbal areas, that the acquired knowledge triad scores on the WISC indicate that her achievement in school related skills is lower than would be expected, (Testimony of Rosoff), and that Tara should have made more progress than the one year in three years scores in reading and language, and that she should have been at the third-fourth grade level in math rather than the second grade level. (Testimony of O'Callaghan) Conspicuously absent from the evidence, however, other than the Dr. O'Callaghan's one statement regarding the expected math skill levels, are specific expectations in her report or in any witness' testimony, regarding Tara's academic skill expectations. As admitted by the experts, expectations regarding progress cannot be definitive, for such an issue is extremely complicated and is not based on an

exact science. As agreed by the witnesses, factors such as emotional condition, attentional abilities, motivation, etc. all play into a person's ability to learn. Accordingly, after reviewing all of the evidence, the clearest conclusion to be made is that Tara's expected progress cannot be pinpointed beyond the facts that she can made progress, and she is not expected to progress at the level of a student of average intelligence. In fact, Tara's evaluator of many years, who attended team meetings, provided her with therapy, and tested her several times over the years, found Tara to be making progress - in fact was developing language acquisition at a fairly good rate. (Exh. S18, pg. 5, P5) This confirms school reports that she made progress in her language, especially in social-interactional use, in turn-taking, requesting clarification, in expressive vocabulary. (Exh. P14, Testimony of MacLean, Masak) I am persuaded that Tara's progress during the '87-'89 period is not in itself indicative of any problems with the Brookline program. Although Dr. O'Callaghan may have hoped for more progress, her testimony, when taken in the context of her own written report and the conflicting evidence regarding progress, was of insufficient clarity to indicate that the level of progress reflected a problem with the Brookline program. Such finding is in fact reinforced by the evidence regarding Tara's progress during her stay at LPS, for the testimony, although indicative of some progress, in no way revealed a speedier progress than achieved while at Brookline. (Testimony of LaPointe, Rosoff) In fact, the Woodcock Reading Test taken seven months after being at LPS tested her at the 3.2 grade level for the total reading cluster - certainly not higher than her reading functioning while at Brookline. (Exh. P25, S15) I also note that Dr. O'Callaghan's concern regarding Tara's limited progress in general knowledge is in fact addressed in the proposed seventh grade program where social studies and science would be provided in the special education setting rather than the regular education setting.

2. Brookline's program addresses Tara's academic needs by providing a language based, multisensory curriculum appropriate for Tara's learning style. The teacher provides, with the ongoing consultation with the speech/language therapist, an intensive language experience with previewing of vocabulary, appropriate cueing, repetition, reinforcement of language in each class. The curriculum provides writing, reading, oral expression throughout the day - in math, social studies, science, critical thinking, reading, and language arts. The same techniques of previewing vocabulary, reinforcing language, cueing, repeating, breaking down directions, etc. are provided throughout the day. (Testimony of Oram, Masek) The speech/language therapist, in addition to consulting with the teacher, provides weekly classes with the students, further intensifying the language work. (Testimony of Masek) I also find that this language program is provided in a multisensory curriculum emphasized by Dr. O'Callaghan as necessary for Tara. That is, language is reinforced through hands on projects, roleplaying, audiovisuals, debates, etc., all related to the reading materials. (Testimony

of Oram) Finally, I find the language based curriculum to be provided in a highly stimulating environment where the three staff persons are highly motivated and where creativity and initiative is encouraged. Such a setting can only be enhancing for Tara.

3. Brookline's program provides the nurturing setting necessary to address Tara's social and emotional issues. First, Ms. Oram is a highly experienced teacher in providing a therapeutic, nurturing setting. (Testimony of Oram, Michaelman, Exh. S4) The testimony of Ms. Oram as well as Ms. Michaelman and Ms. Charlton, describing Ms. Oram as a sensitive, enthusiastic, nurturing teacher, describing the aides also as very supportive, well liked staff, describing the class as a supportive community, all supports a finding that this setting would indeed be nurturing and appropriate for Tara. Furthermore, the class meetings led by the school psychologist and speech therapist provides a healthy setting in which Tara could have developed her emotional/social skills. (Testimony of Oram, Litwack) I note that this class is much more structured than was the sixth grade social group in which the teacher merely monitored the group with little structure provided. (Testimony of Mrs. G., MacLean) Finally, Tara's proposed placement differed significantly from the sixth grade program in terms of social/emotional issues. That is, the seventh grade program is much more of a self-contained setting with much less mainstreaming than provided in the sixth grade. Thus, she would not have had the difficulty of constantly transitioning between classes nor would she have had the difficulty of feeling compared academically to regular education students. Given the fact that Tara's major self-esteem issues occurred in the regular education classes, and that she felt at home in the special education setting and stopped crying when the mainstreamed academics were terminated (Testimony of Mrs. G.), this change in the seventh grade is significant. I am convinced by Dr. Litwack's opinion that in Ms. Oram's class, Tara would have felt part of a nurturing community and would have, with this support, been able to work on her socialization in non-academic mainstreamed settings also. (Testimony of Litwack)

The setting is appropriate for Tara, for the high staff/student ratio provides for a maximum degree of interaction so helpful for Tara; she benefits from the redirection, cueing, reinforcing, and being drawn out by staff. (Testimony of MacLean) In such a setting, Tara can be provided 1:1 or small group or class group work throughout the day. Such is particularly helpful for Tara, for she tends to remain on the periphery of group discussions, so the smaller the group, the more she is required to participate, thus developing her expressive language. (Testimony of Engleman, O'Callaghan)

4. Tara is able to benefit from mainstreaming experiences in the proposed program, as evidenced by her performance during the sixth grade. Although the academic mainstreaming was clearly counterproductive, for Tara could not compete academically with her peers, Tara did interact with students in a positive way in

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nonacademic settings. During recess, she was regularly included by the students in playing basketball. In this situation, she increased her verbal interchanges during this time, and she was at ease in these situations. (Testimony of Masak) She joined a group of regular education students at lunch time and appeared to be at ease, albeit on the periphery. (Testimony of MacLean) In the seventh grade, Tara would have been paired with a special needs student who more easily interacts, thereby helping Tara to handle mainstreamed settings. (Testimony of Masak) Finally, Ms. Oram has established a positive relationship between her class and the regular education population which fosters healthy relations between the students. (Testimony of Oram) I am convinced by her testimony that Tara could benefit from this.

5. The parents assertions were unpersuasive that the Brookline program failed to provide for Tara's academic or social/emotional needs. First, it must be pointed out that when Tara was unilaterally placed at Learning Prep School, the parents' primary concern was Tara's social/emotional needs. Although they would have liked more progress, the parents did not express criticism with Brookline's program, but rather wanted Tara to be in a separate school for special needs students where they thought Tara might feel better about herself. (Testimony of Mrs. G.) The many assertions about the inappropriateness of the Brookline program did not surface until the hearing. Thus, without the notice, Brookline had no opportunity to prospectively address any of the concerns. Secondly, Dr. O'Callaghan, the evaluator who has known Tara for many years, and who had conducted the evaluation used in developing the proposed IEP, had not expressed problems with the Brookline program other than the concern about whether or not to place Tara in a school where she would be surrounded by students similarly disabled, in order to address selfesteem issues. (Exh. S18, P5) Yet she had attended team meetings and was aware of Brookline's program. Yet still, each assertion must be addressed in order to determine the appropriate placement for Tara.

The parents assertion is unpersuasive that Brookline's program fails to provide a thematic approach to its curriculum, thereby rendering it less than satisfactory for Tara. I was convinced that language is indeed the focus of the program, and the necessary teaching methodologies are applied throughout the day in order to maximize her learning. See finding #2. I was convinced that Brookline can address Tara's need to generalize concepts and to have information repeated in order to learn. First, Brookline clearly teaches to these needs throughout the day. Although a thematic approach is helpful in addressing these needs, I was not persuaded that the lack of such approach is necessarily wrong for Tara. As Ms. Oram stated, she is able to provide a more stimulating and creative education by not being restricted to a thematic approach, and can therefore better address the motivational needs of Tara. (Testimony of Oram). In fact, a thematic approach for Tara may fail to capture her interests if the theme happens to be of little interest to her. (Testimony of Engelman) I note that the need for a thematic

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approach to language was not identified by Dr. O'Callaghan, the evaluator who has known Tara's needs extensively. (Exh. S18, P5) Finally, even if Tara were to require a thematic approach, Ms. Oram's class is sufficiently individualized, such that the necessary reinforcement of her language could be provided by using spelling words and vocabulary words taken from social studies, science, and reading.

Although the parents' brief alleges that the Brookline program would be too distracting for Tara, the evidence does not support this. There was no testimony that such was a problem in Ms. MacLean's class, a similar class setting, nor was there testimony comparing her behavior at LPS.

The parents were unpersuasive that the Brookline curriculum was inappropriate for Tara because it was too babyish. Although Ms. Oram admitted that some of the pictures were too babyish, the general practice is that such pictures are removed from the students' work. (Testimony of Oram) That some pictures mistakenly were not removed does not render the curriculum too babyish. An extensive review of the materials evidences that the staff uses an eclectic set of materials from many sources, some directly from the regular education seventh-eight grade curriculum, some from high interest materials, some from workbooks geared to Tara's skill levels. Given the staff's sensitivity to the student's self-esteem issues, and given the vast array of materials used, I was persuaded that the curriculum, as a whole, is not too babyish for Tara.

The parents were unpersuasive that the Brookline program fails to address Tara's social/emotional needs in that the folder system renders the students working alone for a majority of the time. Such is just not true, for much of the folder work includes two or more students working together. Furthermore, even though a student may be working on his/her own folder, the students are clearly together and feel they are together. (Testimony of Oram) Finally, the program is flexible enough such that, if it is best that Tara be grouped with other students for folder work, such could be provided. (Testimony of Oram) I must emphasize at this time also, that the Brookline program offers smaller group settings than at LPS, and this would foster more active participation on Tara's part than can occur in the larger group setting in which Tara tends to stay on the periphery. The parents' concern for Tara's social/emotional growth is also addressed through the major thrust of the program in providing a nurturing community in which each student is supported. See finding #3.

The parents were unpersuasive that the Brookline program is inappropriate for Tara or illegal, because the aides are functioning as teachers unqualified to perform such functions. The policy of the Department of Education states:

> Instructional aides should not have the responsoibility for dianosing student needs, introducing new concepts,

developing lesson plans or otherwise providing primary instruction to special education students.

Fundamentally, ... the instructional aide does not have primary responsibility for a class or a resource room. Rather, the instrucitonal aide assists the teacher in such activities as: (1) small group instruction; (2) individual tutoring; or (3) supervising students in non-classroom activities such as recess.

Direct supervision means that most of the time, the responsible teacher is physically present in the classroom with the aide. When the teacher is not actually present in the room (s)he is immediately available... The presumption is that the teacher is responsible for the conduct of the classroom and the design of instruction; the aide assists the teacher and acts under the teacher's direction /direct supervision.

Department Policy on Teacher Aides Akpril 15, 1982

After extensive review of the evidence, I am convinced that that class as a whole, is run by the teacher Ms. Oram, that the aides work in close contact with the teacher and have available to them ongoing supervision. As such, the fact that the aides are not qualified to teach is not significant.

What is more important is whether the aides effectively assist Ms. Oram in teaching, and whether Ms. Oram effectively supervises them. I find that with a few exceptions discussed below, they do. The aides both relate with enthusiasm to the students; the students like them. The aides are motivated to do a good job and interact well with Ms. Oram in the exchange of ideas, asking for guidance, and receiving feedback from Ms. Oram. Such was testified to repeatedly by Ms. Oram, Ms. Charlton, Dr. Engelman. These are the qualities necessary for effective assisting, and they far exceed the requirements. Secondly, I find that, on the whole, Ms. Oram provides the necessary supervision. Except as noted below, she designs the curriculum, she selects appropriate materials which reinforce her direct teaching for each student's workfolder. She meets with the aides on a regular basis as well as on an informal basis. Although the parents assert that the teacher and aides cannot meet on a regular basis, due to their busy schedules, they were not persuasive. In light of the extensive testimony from Ms. Oram, the aides, as well as Ms. Masak, that they do meet, a reasonable conclusion is that the meetings do occur, be it before school, after school, lunch time, or freed up time. Throughout the day, the aides are free to ask her for guidance as needed, and sporadically, whenever Ms. Oram has a free moment, she roams the room in order to oversee the aides' work. (Testimony of Oram) Although the parents assert that Ms. Oram cannot supervise while she is also teaching a small group, Ms. Oram's testimony that she is experienced and can therefore monitor the aides was creditable. For example, wahen her students are reading

silently, or writing for a few minutes, she might roam the class. Or if the aide needs guidance, she can provide it during such time. (Testimony of Oram) In fact, this kind of ongoing supervision was also observed by Ms. Masek and Dr. Engelman. (Testimony of Masak, Engelman) The parents appropriately expressed concern with the fact that the aides had not read each student's IEP goals and objectives and skill levels; the aides should have done so. (Testimony of Engelman). However, such concern can be addressed by the aides, and is certainly not a reason to reimburse the parents for their unilateral action. Indeed, to the extent that the aides would work with Tara in reinforcing her learning, I am persuaded that it would be ideal for Tara, for she would receive alot of attention from well supervised adults as well as alot of opportunities to express herself (rather than just observe others as she stays on the periphery).

The evidence produced by the parents regarding the role of the aides in the spelling, literature, and computer classes (each once/week), and science (twice /week for two thirds of the school year), is more disturbing, for the aides appear to be teaching rather than assisting. Such practice is in violation of the Department's policy regulating the role of aides. Furthermore, the practice provides the students with teaching by persons not sufficiently trained to maximize Tara's educational development. That is, the aides are not just reinforcing learning, but they are, by virtue of their being the sole educator of these subjects, teaching new material. Furthermore, the aides designed the curriculum for the computer and the science units (Testimony of Oram). This misuse of the aides in the science class, however, is tempered by the fact that they are supervised by Ms. Oram. The computer class, although taught by an aide with computer experience, should have been and was not supervised. An appropriate remedy for this could call for this class to be taught by a regular education computer staff person or by Ms. Oram with the assistance of the aide. Thus, I find that mistakes have been made, but they are not of the magnitude of concern that would render the class as a whole, illegal or inappropriate for Tara. The necessary supervision can and should be provided; a less-restrictive placement is not the appropriate remedy in this case, for the mistakes are of a finite nature and do not render the entire program illegal or inappropriate. Although the parents attempted to show that the schedule is such that the problem cannot be remedied, I was not convinced. It may require some reworking of the groups, some shifting of staff responsibilties, but clearly, a 12:3 ratio where two of the staff are aides, is a workable and commonly used learning situation for students like Tara. To reimburse parents for a less restrictive placement for an issue that was not raised until the hearing and which can be remedied would run against the intent of the law. If an issue of prospective placement were before me, an order would be warranted that Brookline produce a class schedule which assures that teachers, not aides, are responsible for each of Tara's subjects, and that the periods where the aide works with the students are periods for reinforcing the teaching. But given

the limitation of issues to whether the parents should be reimbursed, no such order is appropriate.

6. The remaining assertions of violations are not outcome determinitive, and therefore do not impact on the finding that Brookline's program is appropriate for Tara.

First, the errors in calculating the hours of special education services on many of the IEP's of the proposed class were admittedly made. However, they are calculation erors, not errors in the services provided; there is no evidence that parents are told services would be provided that were then not provided. Thus, although inaccurate, they do not impact on Tara's program in any substantive way. What is offered would be provided. The length of the school day remains the same. Certainly, this would not warrant reimbursement for a unilateral placement made prior to any knowledge of this technical violation.

Second, the assertions of extra services being provided without proper IEP amendments is also without merit in regards to the parents' rights to reimbursement. The parents were aware of the changes and in fact agreed to them, albeit, maybe some technical violation did occur. Again, this is not supportive of any right denied to Tara.

Third, whether the one year substitute special education administrator was properly certified is an issue for the Department of Education to determine. However, there was no evidence that the alleged lack of certification (which was in fact obtained by June '90) would have affected Tara, for Ms. Charlton was a well-qualified professional with extensive administrative experience.

Fourth, to the extent that certain classes are provided which are not listed on the IEP's, I was persuaded that the goals and objectives of reading, writing, etcetera, are in fact addressed during those time periods. Thus, appropriate special education services are being provided.

II. I find that the Learning Prep School, by virtue of its being a private school for special needs students, cannot provide Tara with an educational program which maximizes her potential in the least restrictive setting. Furthermore, although Learning Prep School amy provide Tara with an excellent highly structured, language based program, the parents provided no evidence that Tara's academic progress is better at LPS than at Brookline. Although Tara may have taken a test showing that she can read to learn whereas she was unable to do so at the same level in the beginning of the school year, (Testimony of LaPointe), this is insufficient to show a difference in her rate of progress, given her steady one year's progress in reading over a three year period. (Testimony of O'Callaghan, Exh. S12, S15) Furthermore,

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Tara's observed participation in class discussions was very minimal - similar to her previous behavior at the Baker School. The one area of success - her social/emotional skills - were also unpersuasive, for Tara's source of social emotional difficulties at the Baker School waere the mainstreamed academic settings. (Mrs. G., O'Callaghan) Given that the proposed program eliminated these settings, progress in the social/emotional area would have been predicted at the proposed program as well as at LPS. Finally, although Dr. O'Callaghan had hoped for better math progress, there was nothing in the record to indicate that LPS offered a math program which better provides for Tara's math progress.

Brookline's assertion that LPS fails to provide a sufficiently flexible program to accommodate Tara's individual needs was not supported by the evidence, and is not a basis for finding LPS inappropriate for Tara. By virtue of the large population of students, Ms. Rosoff was convincing that Tara is placed with students of sufficiently similar skill levels and learning styles, so as to individualize to her learning needs. Furthermore, the high degree of structure and supervision in the teaching methodology and curriculum are an assert to the program, not a source of inappropriate rigidity, for it assures the continued high quality of services to the student. Be that as it may, LPS is an overly restrictive setting for Tara G. and therefore, is not the appropriate placement for her.

ORDER

Brookline is not responsible for reimbursing the parents of Tara G. for tuition expenses at LPS for the 1989-1990 school year.

SIGNED: Sandra W. Sherwood

Sandra Sherwood
Hearing Officer
Bureau of Special Education Appeals

DATED: November 2, 1990

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FEB 4 1991

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF EDUCATION

BUREAU OF SPECIAL EDUCATION APPEALS

In re: Tara G. **BSEA #90-0985**

DECISION ON MOTION FOR RECONSIDERATION

Procedural History

A decision on the above-numbered case was issued on November 2, 1990, which found that the Brookline Public School's (hereafter, Brookline) proposed 1990-1991 IEP was appropriate for Tara G.. It called for a 502.4 prototype placement at the Baker School in Brookline, MA which provided Tara G. with an educational program which maximized her development in the least restrictive setting. The decision further found that the Learning Prep School, although also offering a good program, was more restrictive, and therefore not the appropriate placement for Tara.

The parents submitted a Motion for Reconsideration on November 19, 1990, alleging serious errors of law and ask the Bureau of Special Education Appeals to permit further review of the evidence, and alternatively, to rule on the Parents' Motion for Summary Judgment. They seek a determination that the Brookline class is illegal in that the aides are teaching in contravention of the policy statement and regulation of the Department of Education issued April 15, 1982.

Brookline opposed this motion on November 27, 1990, asserting that the parents failed to show serious error of law, that the parents distorted the record, and that the parents' arguments are just a restatement of the arguments already made in the Closing Arguments submitted by the parents.

RULING

The Parents' Motion for Reconsideration and alternatively, Motion for Summary Judgment, is denied, as follows:

The major thrust of the parents' allegations is that the class is illegal and inadequate because the aides are teaching

rather than assisting in conflict with the Department of Education policy. These assertions are not new, but were presented to the hearing officer in testimony and closing arguments. The decision addressed these assertions, and found that the program was appropriate for Tara. It found opportunity to maximize her potential in the least restrictive setting. It found that the aides, for the most part, are supervised by the teacher, and are assisting the teacher. Thus, the program did not as a whole, conflict with the Department of Education policy. The decision further found that the parts of the program which were in conflict were minor, could be remedied and did not warrant the parents' unilateral actions. The Motion for Reconsideration raises no facts or issues, which were not already considered. Further, the parents were unpersuasive that there is any error of law in the decision. That every witness was not quoted in the decision does not mean that the witness' testimony was not considered. There is no error of law; after considering all the evidence, the hearing officer was persuaded that the Baker School program was appropriate for Tara.

Although each and every assertion need not be addressed again, a few statements are warranted. It should be pointed out that the parents' assertion was incorrect that Ms. Rosoff's testimony was not credited in regards to her observation at the Baker School that two students worked without any staff intervention for approximately two hours. It should be noted that this statement was weighed against a) the voluminous testimony that students were constantly receiving staff intervention, and b) Ms. Oram's response to Ms. Rosoff's testimony, wherein Ms. Oram was indeed surprised, implying the unusual nature of such an occurrence. The parents also assert that the procedural irregularities warranted a finding that Tara should attend the Learning Prep School; again, this was fully addressed in testimony, closing arguments, and the BSEA decision, which found the procedural problems did not "compromise the educational benefits" of the Brookline program, and thus do not merit placement in a more restrictive program. See, Roland M. v. Concord School Committee, _____ F.2d _____, 16 EHLR 1129 (1st Cir. August 1990) The parents were unpersuasive in establishing any error of law in such finding.

SIGNED: Sandra Sherwood (KRA)
Sandra Sherwood
Hearing Officer
Bureau of Special Education Appeals

DATED: February 4, 1991

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3/18/91

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Adam C. v. New Bedford **BSEA #90-1019**

DECISION

This decision is issued pursuant to M.G.L. c. 71B and 30A, 20 U.S.C. 1401 et seq. and the regulations promulgated pursuant to those statutes.

A hearing was held on May 1, 2 and 10, 1990. The first two days of the hearing were held at the Southeast Regional Education Center in Lakeville, Massachusetts, and the third day was held at the Central Office of the Department of Education in Quincy, Massachusetts. The record consists of exhibits submitted by the parents labeled P-1 through P-19, exhibits submitted by the New Bedford Public Schools ("New Bedford") labeled S-1 through S-5 and approximately 6 hours of recorded oral testimony. Closing arguments were submitted on or before May 21, 1990 and the record closed on that date.

Those present for all or part of the hearing were:

William H. Marginson	Assistant Superintendent for Special Services, New Bedford
Rosemary P. Lucas	Assistant Principal, New Bedford
Mary Gleghorn	Special Needs Teacher, New Bedford
Ralph Tripp III	Director of Special Services, New Bedford
Fred G.	Grandparent
Joan G.	Grandparent
Emerson W. M.	Mother's live-in companion
Russalee C.	Parent
Tina Lafiosca, Ph.D.	Psychologist, Franciscan Children's Hospital
Nancy Hinkley	School Adjustment Counselor

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Susan Furtado	Special Needs Teacher, New Bedford
Lawrence Melander	Lower School Supervisor, Perkins School for the Blind
Elizabeth K. Balaschak	Attorney for Parents
James B. Ross	Attorney for New Bedford
Jane Lavoie	Hearing Officer, BSEA

ISSUES

Is the 1989-1990 IEP proposed by New Bedford reasonably calculated to provide the maximum feasible educational benefit to Adam in the least restrictive setting?

2. If not, is the weekday residential program at Perkins School for the Blind, a private school located in Watertown, MA, the least restrictive placement appropriate for Adam?

STUDENT PROFILE

Adam is a 10 year old (D.O.B. 6/12/80) child who has been legally blind since birth as a result of bilateral aniridia and congenital nystagmus. He has also been noted to have a thyroid abnormality. Adam has been diagnosed as moderately mentally retarded with an I.Q. of 42. He has significant deficits in the areas of vision, speech, language and cognition, and he needs to improve daily living skills as well as fine and gross motor skills. Adam has been a special needs student in the New Bedford public school system since 1983, when he was three years old. He has exhibited behavioral difficulties at home that have not been evident in school. In approximately March 1990 he was placed on 50 milligrams per day of mellaril.

PARENT'S POSITION

Adam needs a 24 hour residential program such as that offered at Perkins School for the Blind. Over the last two years Adam has shown no progress in daily living and survival skills, and his behavioral problems have increased. Parents have met with psychologists and tried behavior management techniques, but their success with Adam has been limited. The parent trainer provided by the school offered no new suggestions. Adam has made a striking lack of progress in his current placement and has been unable to generalize learning. He needs an integrated behavioral approach to learning, focused on functional academics, self care and survival skills. Given Adam's age and size, it is possible to reshape his behavior now; as he gets older he will be more uncontrollable. A highly structured 24 hour program concentrating on the development of life skills will offer Adam the maximum benefit.

SCHOOL'S POSITION

Adam should remain in his current placement in the Chart III program in New Bedford public schools. Adam has never presented behavioral problems in school; the problems he exhibits at home are not educational in nature. The school tried to provide parents with a trainer and advice concerning respite care. The Chart III program is highly structured, provides appropriate instruction in academics and daily living skills and allows Adam some integration with non-special needs students. New Bedford can meet all of Adam's educational needs. Adam has made great strides in the Chart program which will continue to offer him the maximum feasible educational benefit in the least restrictive setting.

SUMMARY OF THE EVIDENCE

1. Adam has been a special needs student in New Bedford Public Schools ("New Bedford") since 1983, when he was three years old. He initially attended a pre-school program at the Hathaway School (prototype 502.8). In September 1985, Adam entered an early childhood special needs kindergarten at the Winslow School (program prototype 502.3). While in pre-school and kindergarten, Adam also received services at the Swartz Rehabilitation Center in the New Bedford area. In the fall of 1986, Adam began a second year of kindergarten at the Carney School in a special needs classroom. After one month in this placement, Adam was transferred to the Chart II program at the Pulaski School (prototype 502.4). (Testimony of Russalee Carter, Exh. P-8).

2. The Chart program in New Bedford is a comprehensive program for students with moderate special needs. The objective of Chart is to develop skills in functional academics, or learning skills which help students function in society. The children in the Chart program have various levels of cognitive functioning. The more disabled children work mostly on independent living skills rather than on traditional academic subjects. While there are no grades in the Chart program, there are four progressive levels and children are grouped roughly according to ages. Chart I is the preschool program for 3 to 5 year olds, Chart II is mostly for 6 to 9 year olds, Chart III for 10 to 12 year olds and Chart IV for 13 to 15 year olds. As children move through the different levels of Chart they should work on more sophisticated skills and become more independent. (Testimony of Ralph Tripp).

3. Adam attended the Chart II program at Pulaski School from October 1986 through June 1989. Adam's mother, Mrs. C., testified that in the Chart II program Adam received occupational therapy, physical therapy, speech therapy and vision services. According to Mrs. C., during Adam's placement in Chart II he worked on motor skills such as stacking and coordination, and on daily living skills such as brushing teeth, washing dishes, setting the table, buttoning and zippering. Adam learned to recognize colors, the numbers 1 through 10, and the alphabet with the exception of a few letters. According to Mrs. C., Adam

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learned a lot about dressing himself and his motor skills improved.

4. In September 1988 James Clancy, Consulting Psychologist for New Bedford, conducted a psychological evaluation of Adam (Exh. P-16). Mr. Clancy found that Adam presented as a pleasant youngster with a measured intelligence in the moderately retarded range. All areas measured in Dr. Clancy's neuropsychological screening of Adam were consistent with intellectual expectations. Results of auditory memory tests were negatively influenced by Adam's speech disorder, therefore Mr. Clancy indicated that an audiological evaluation might be in order to rule out possible sensory deficit. Other areas of the evaluation reflected expressive and receptive language difficulties. Achievement results were all below the norm and below expectational levels. According to Mr. Clancy, Adam would continue to require a small student-teacher ratio program where individualization would be offered to address his weaknesses and assist in basic skill acquisition. Mr. Clancy indicated that Adam's vision should be carefully monitored, and speech and vision therapy and adaptive physical education should continue. Mr. Clancy found no indications of significant psychopathology and no evidence of any disturbance in reality testing or distortions in thought processing. In Mr. Clancy's opinion, Adam must experience considerable frustration related to his visual and communication limitations. Mr. Clancy noted that Adam was being seen by a counselor, and recommended that this continue. According to Mr. Clancy, Adam appeared to be well placed and managed in the the Chart progam, and continued slow but steady progress with the remedial supports already in place would be considerable favorable.

5. In preparation for a Team meeting held in February 1988, Elena Lovett, Adam's classroom teacher, and Norma Winsper, teacher of the Visually Impaired, completed Special Services Educational Assessments, and Catherine Roussos completed a Speech, Hearing and Language Evaluation (Exh. P-14).

Ms. Lovett's February 1988 assessment indicates that Adam was still at a pre-readiness level and had not been able to succeed in any formalized reading program. Adam's math skills were also limited to a pre-readiness level. Ms. Lovett reported that Adam was cooperative in school, and exhibited a satisfactory attention span (ability to work up to 15 minutes with indirect supervision on familiar tasks) and satisfactory motor coordination (ability to ride a bike, interested in two wheeler with training wheels). According to Ms. Lovett, while Adam's speech could be difficult for unfamiliar adults to understand, he was able to make all of his needs known. Ms. Lovett reported that Adam had satisfactory short term memory and fair long term memory, and that he got along with school personnel and peers. Ms. Lovett concluded that Adam should remain in his Chart II placement with emphasis placed on socialization skills, integration where appropriate, and self-help, motor and cognitive skills being addressed with age appropriate peers.

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Ms. Winsper's February 1988 report indicates that Adam's fine and gross motor skills were depressed. According to Ms. Winsper, Adam could name most colors, recognize numbers 1-10, name most letters of the alphabet, name many objects, match shapes, and distinguish sizes. Adam is described as usually cooperative, although frustrated when faced with a new task and confused by departures from routine. Ms. Winsper reported that Adam was easily distracted, worked longer on tasks with 1:1 assistance, and had a short, but improving, attention span. According to Ms. Winsper, Adam lacked basic coordination, was somewhat awkward, had poor endurance for many activities, had weak fine motor skills, and worked slowly. His speech was difficult to comprehend but improving somewhat, and he seldom offered conversation independently. Ms. Winsper indicated that Adam got along with peers but frequently preferred to be alone, and was cooperative but not affectionate with adults. Ms. Winsper recommended that Adam continue in a small structured environment, with speech services and the services of a teacher of the visually impaired to remediate fine motor skills.

Catherine Roussos conducted a speech, hearing and language evaluation on December 9, 1987 and January 1, 1988. According to Ms. Roussos, Adam's hearing acuity was found to be within normal limits for conversational speech and he exhibited little difficulty with discrimination and reauditorization skills. On the Goldman-Fristoe Test of Articulation Adam exhibited various sound substitutions and omissions, final consonant deletions and cluster reductions. On the Peabody Picture Vocabulary Test he received an age equivalency score of 3-5. Adam demonstrated good auditory comprehension skills, was able to follow one and two step commands with little difficulty and could identify most students and staff that he worked with on a consistent basis. On the Expressive One Word Picture Vocabulary Test Adam achieved an age equivalency score of 3-9. His length of utterance was approximately one to four words. According to Ms. Roussos, Adam's pragmatic/social skills were fair. He was able to initiate and responds to conversation and establish eye contact. Adam's vocal qualities were within normal limits for age and sex. No dysfluent speech was noted during formal testing or conversational speaking situations. Ms. Roussos found that Adam had delays in receptive and expressive language abilities, and that articulatory errors compromised his speech intelligibility out of context. She recommended continued speech and language therapy for two thirty minute sessions per week in a small group setting.

6. At a Team meeting held on February 1, 1988 a program prototype 502.4 IEP covering the period March 1988 - March 1989 was produced (Exh. P-11). According to that IEP, the Team made the following recommendations: 1. continue current placement (Chart II) with integration when appropriate with age appropriate peers, 2. continue speech therapy for two 30 minute sessions per week, 3. continue service of teacher of the visually impaired for visual training for two 30 minute sessions per week, 4. adaptive

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physical education as part of the regular Chart class program, 5. refer for counseling to school based MENTOR program or similar program. (See Exh. P-11)

7. Nancy Hinkley, school adjustment counselor at Polasky School, was assigned to Adam during his three years in the Chart II program. Ms. Hinkley testified that she met with Mrs. C. at home on one occasion when Adam was not present. Descriptions of Adam's behavior provided by Mrs. C. indicated that Adam behaved quite differently at home than he did in school. To Ms. Hinkley's knowledge, Adam did not exhibit behavioral problems in school. During Ms. Hinkley's home visit and at Team meetings attended by Ms. Hinkley, Mrs. C. discussed ongoing behavioral problems exhibited by Adam at home. Ms. Hinkley attended a Team meeting held in February 1988. The IEP drafted at that meeting (Exh. P-11) states that the Team recommended a referral "for counseling to school based MENTOR program or similar program." At the time of this recommendation, Mrs. C. was paying for Adam to receive counseling from a private therapist, Dr. Roy. Counseling services provided by MENTOR would be paid for by the school. According to Ms. Hinkley, although the Team recommended counseling through the MENTOR program in February 1988, this service was not actually available until September 1988 because the MENTOR counselor had too many other cases. Ms. Hinkley testified that in the fall of 1988, Mrs. C. indicated that she did not want counseling services for Adam through the MENTOR program. According to Ms. Hinkley, Mrs. C. did not like the technique used by the MENTOR counselor, and felt that he did not know now to relate to Adam.

8. Susan Furtado was Adam's teacher in the Chart II classroom at Pulaski School from September 1988 to June 1989. Ms. Furtado testified that the classroom contained seven students and one full-time aide. According to Ms. Furtado, students arrived at school at 8:55 a.m., left at 2:55 p.m. and spent most of their time in her classroom. Adam and other students left the classroom for special services such as adaptive physical education, speech and vision, ate lunch in the regular cafeteria and attended assemblies with non special needs students. Ms. Furtado testified that on most days Adam also left the classroom with one other student to bring the attendance list upstairs to the main office.

Ms. Furtado testified that Adam needed help with ADL skills. While Adam's zippering ability improved during the year, he was unable to start zippering by himself. Adam was also unable to tie his shoes. Ms. Furtado indicated that Adam had a slight hand tremor which did not seem to impede his progress. According to Ms. Furtado, Adam spoke in one or two work phrases. His vocabulary and his use of verbal expression increased over the course of the year.

Ms. Furtado testified that 5 of her 7 students went on to the Chart III classroom taught by Mary Gleghorn. According to

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Ms. Furtado, of those 5 students, Adam had made the most progress in her Chart II classroom. Ms. Furtado indicated that when Adam left the Chart II program he knew his colors, could count from 1 to 15 with some prompting, and could speak a few simple sentences (noun - verb - object) with prompting. According to Ms. Furtado, Adam stayed to task in group and could work independently at his desk until the completion of a task. Adam enjoyed games and activities and did not present a behavior problem in class. Ms. Furtado described Adam as compliant and eager to please.

Ms. Furtado indicated that she met Adam's mother at an open house in September 1988 and saw her again at a Team meeting in January 1989. According to Ms. Furtado, the school did not pay for the counseling that Adam was receiving from Dr. Roy, and Mrs. C. did not want to switch to a new counselor employed by the school.

9. A three year evaluation of Adam was conducted in January 1989. Pursuant to this evaluation Ms. Furtado completed a Special Services Educational Assessment, Lynne Chapman completed a Speech, Hearing and Language Evaluation and Norma Winsper, Teacher/Consultant for the Visually Impaired, conducted the Visual Efficiency Scale and completed a Special Service Educational Assessment (Exh. P-13).

Ms. Furtado's January 1989 assessment indicates that Adam knew most lower and upper case letters, but had difficulty printing them. The assessment also indicates that Adam could order and recognize numbers 1-10, and had learned colors and shapes. With respect to Adam's overall adjustment and functioning, Ms. Furtado's assessment states the following: "Adam is very cooperative with school staff and accepts authority well. He is distracted by auditory and visual stimuli, but shows growth. Adam needs development in both fine and gross motor skills. He can sit quietly while the class is listening to a story or performing a structured activity. Adam has a difficult time expressing himself orally, but shows great improvement. He has deficits in memory skills. Adam has shown great strides in speaking and playing with peers." Ms. Furtado recommended an occupational evaluation because of Adam's weakness in fine and gross motor skills.

Ms. Chapman's January 1989 evaluation indicates that Adam has delays in receptive and expressive language skills, and that articulation errors compromise his speech intelligibility. According to Ms. Chapman, Adam's hearing appeared adequate for conversational situations. His speech was characterized by multiple errors. On the Receptive One-Word Picture Vocabulary Test, Adam achieved an age equivalency score of 4.7 years. Adam demonstrated good auditory reception skills and could follow one and two step directions. He scored at the 3.4 year level on the Test for Auditory Reception of Language. The Expressive One-Word Picture Vocabulary Test placed Adam's language age at 3.6 years. Ms. Chapman's assessment indicated that Adam speaks in utterances of approximately 1-4 words in length, omitting such words as the,

is/are and verb endings. Adam demonstrated fair pragmatic skills. He could establish eye contact, greet others, initiate and responds to conversation, identify himself and so forth. Ms. Chapman recommended an increase in speech and language therapy to three 30 minute sessions per week in a small group setting.

In her January 1989 evaluation, Ms. Winsper found that Adam had low to marginal visual efficiency. He was able to make discriminations between solid black geometric forms and match circle outlines when a marked difference in size was present. Adam had difficulty noting minute differences in form, conture, size and spatial position. He was able to discriminate letter symbols and groups of symbols when size was large enough, although size was not a factor when the material was familiar to him. Adam demonstrated some reversal problems.

Ms. Winsper's report indicates that Adam is inclined to be insecure and displays some nervousness when he is asked to perform a task and is being observed. Ms. Winsper noted that Adam had poor concentration, speech problems and poor vision. According to Ms. Winsper, Adam was able to name colors, identify basic shapes, perform some sorting tasks, match colors, shapes and objects, write his name with a model to copy, and count to 20.

Ms. Winsper reported that Adam had difficulty tolerating minor departures from routine. He accepted authority, was somewhat passive and did not display affection. According to Ms. Winsper, Adam was easily distracted by both auditory and visual stimuli, had a short attention span, and needed to move around. His fine and gross motor skills were depressed, he had a weak grip and had difficulty controlling a pencil. Ms. Winsper reported that Adam was difficult to understand and seemed to avoid speaking to adults. He displayed deficits in both short and long term memory.

Ms. Winsper concluded that Adam continued to need a small, structured group placement. According to Ms. Winsper, Adam requires much individual instruction and attention, and should have preferential seating for all visual tasks. Ms. Winsper indicated that material should be enlarged for Adam when necessary, and positive and negative contrast should be used. Ms. Winsper recommended an occupational therapy evaluation, continued services with a teacher for the visually impaired for visual stimulation and training along with continued fine motor training for handwriting.

10. The Team meeting for Adam's three year evaluation was held on January 25, 1990. The Team recommendations, as stated on the IEP produced at that meeting (Exh. P-10), were as follows: 1) Continue current placement in the Chart II program for the remainder of the 1988-1989 school year, 2) Increase speech therapy services to three 30 minute sessions per week for work on articulation and receptive and expressive language, 3) Increase

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visual training services provided by the teacher of the visually impaired to three 30 minute sessions per week, 4) Refer for an occupational therapy evaluation, 5) Explore the possibility of providing the family with help in behavioral management, 6) In September 1989 assign Adam to the next Chart level class (Chart III) for work on daily living skills, cognitive and social skills, 7) Continue speech therapy services at three 30 minute sessions per week, 8) Continue visual training at three 30 minute sessions per week.

11. Ralph Tripp, Director of special services for New Bedford since February 1990, supervised the Chart program between 1988 and 1989. Mr. Tripp testified that in the fall of 1988 Pulasky school personnel asked him to speak to Mrs. C. about her concerns with Adam's behavior in the home. Mr. Tripp spoke to Mrs. C. in late November or early December 1988. At the time Adam was exhibiting behavioral difficulties in the home but not in school. Mr. Tripp suggested that Mrs. C. Contact the Department of Social Services and the Department of Mental Retardation to see what services they might offer. Mr. Tripp testified that Mrs. C. told him that she was in the process of obtaining respite care assistance through the Kennedy Center. Mrs. C. also told Mr. Tripp that she might seek residential care for Adam.

Mr. Tripp attended the Team meeting held on January 25, 1989. The IEP drafted at that meeting (Exh. P-10) states that the Team recommended "explor[ing] the possibility of providing the family with help in behavior management." Mr. Tripp testified that he agreed to pursue a behavior management specialist for the home. He indicated that although this service was written into the IEP, there was no specific time period for setting it in place. Mr. Tripp testified that Ed Sliney was hired to provide behavior management assistance in the home on a regular basis. Mr. Tripp could not recall when Ed Sliney was first sent to the home, and gave no testimony regarding the services, if any, provided by Mr. Sliney.

12. On February 14, 1989, Mrs. C. rejected the January 25, 1989 IEP in full. On or about March 1989, at the suggestion of Dr. Diagnault, Mrs. C. contacted Franciscan Children's Hospital to arrange for an independent evaluation of Adam. The evaluation was scheduled to take place in July 1989.

13. On May 30, 1989 the parties attended a mediation session conducted by Katherine Bures (Exh. P-9). At that session the parties agreed that the IEP drafted on January 25, 1989 would be implemented in full with the following modifications: 1) ADL skills would be modified to include toileting, 2) Speech therapy services identified on the IEP would continue through the summer months, 3) Family management services identified on the IEP would continue through the summer months, 4) If Mrs. C. enrolled Adam in a summer camp within New Bedford, upon Mrs. C's request, the school would provide a 1:1 aide to work with Adam at camp, 5) New Bedford would check with Franciscan Children's Hospital

to inquire about the scheduling of an occupational evaluation, 6) the Team would reconvene within two weeks of receiving the results of the Franciscan evaluation to access continued programming for the 1989-1990 school year, 7) commencing on the first day of the 1989-1990 school year, Adam would be assigned a 1:1 aide, 8) current vision testing information would be forwarded to the school by the parent if it was not already in Adam's school records.

14. On July 31, 1989, Adam was admitted to Franciscan Children's Hospital for a five day multidisciplinary inpatient evaluation. Adam's psychological assessment was completed by Risa H. Bressler, Psychology Intern, under the supervision of Tina Lafiosca, Ph.D., Clinical Supervisor (Exh. P-2). Ms. Bressler administered the Stanford-Binet Intelligence Scale, conducted a diagnostic play session with Adam, completed the Vineland Adaptive Behavior Scales with Mrs. C. as informant, and conducted a telephone consultation with John Diagnault, Psy.D.

Ms. Bressler's report indicates that Adam is described by the school as generally cooperative with no significant behavioral difficulties. Mrs. C. reported that Adam has a history of behavioral difficulties at home which include temper tantrums, screaming, running away, kicking and general noncompliance. According to Mrs. C., the frequency and intensity of Adam's behavioral outbursts in the home were becoming worse. Dr. Diagnault informed Ms. Bressler that he had recently consulted with the family. According to Dr. Diagnault, Mrs. C. had been seeking behavioral intervention on an outpatient basis for two years in an attempt to address Adam's behavior, but this intervention had been only minimally successful. Based on his assessment of past treatment and the status of the family, Dr. Diagnault recommended residential placement for Adam.

According to Ms. Bressler, Adam was passive and cooperative during the evaluation. He demonstrated little spontaneous speech and his verbalizations were difficult to understand. He tended to answer questions with one to two word responses. Adam completed all tasks presented to him and did not demonstrate any behaviors which would indicate a difficulty seeing test materials or to compensate for such a difficulty.

The assessment results indicated that Adam's cognitive abilities are significantly delayed. On the Stanford-Binet, he achieved a test composite of 42, placing him in the moderately retarded range. On the seven subtests he achieved age equivalency scores of between 2 years 11 months (verbal comprehension) and 4 years 9 months (quantitative reasoning). On the Vineland Adaptive Behavior Scales, completed with Mrs. C. as informant, Adam obtained an Adaptive Behavior Composite of 32. His age equivalency scores were 1 year 9 months in communication, 2 years 3 months in daily living skills and 2 years 6 months in socialization. This indicates that Adam's skills, as reported by his mother, are very significantly delayed.

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Due to Adam's limited cognitive skills and language deficits, data collected by Ms. Bressler on Adam's emotional functioning is limited to behavioral observations. Within the testing session, Adam appeared to relate passively with adults. He made no requests for reciprocal activity which would have engaged him with the evaluator. Instead his interactions were limited to responsing to questions posed to him. Adam demonstrated a concreteness in his play activities and tended to miss the symbolic meaning of toys. He also had a short attention span for toys, and shifted from one activity to another in an unrelated way. Adam did not engage in any meaningful symbolic plan.

In summary, Ms. Bressler found that Adam is functioning in the moderately retarded range, and that his cognitive limitations are further compounded by language deficits and visual impairment. Her recommendations were as follows:

"1. The information obtained by this examiner suggests that Mrs. C. has actively pursued outpatient intervention to address Adam's behavioral difficulties, but reportedly has found his behavioral problems to be continuing to escalate. It is recommended that a residential placement be sought for Adam which can address his educational and behavioral needs. It is hoped that Adam will be placed in a program which encourages and supports family involvement.

2. It is recommended that Mrs. C. be referred to the Department of Mental Retardation in order to provide her with a case manager who can assist her with implementing the recommendations for residential placement as well as to assist in acquiring the maximum amount of services for Adam until a placement is found, including respite care for his family.

3. Until a placement is found, Adam continues to require placement in a small, substantially separate, self contained classroom which is designed to address the educational and behavioral needs of children at his level of functioning. It is important that the focus of his curriculum be on functional academics, daily living skills and maximizing his communication abilities.

4. Adam would benefit from a structured afterschool program which would provide him with additional opportunities to interact with peers and provide some respite for the family."

15. Tina Lafiosca, Ph.D., psychologist at Franciscan Children's Hospital, supervised Ms. Bressler's evaluation of Adam. Dr. Lafiosca testified that the evaluation was intended to assess Adam's intellectual, daily living and emotional functioning. According to Dr. Lafiosca, results of the Stanford Binet test administered by Ms. Bressler indicate that Adam is functioning in the moderate range of mental retardation. Dr. Lafiosca testified that this is consistent with prior testing

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conducted by Children's Hospital. According to Dr. Lafiosca, Adam's intellectual level has remained static over the years, and he has not gained as much information as would be expected. Adam needs a functional educational program with a focus on basic life skills. The results of the Vineland Adaptive Behavior Scales, completed by Ms. Bressler with Mrs. C. as informant, indicated that Adam's adaptive skills level is below his cognitive functioning. According to Dr. Lafiosca this indicates that Adam has the potential to do better in the adaptive skills area. The assessment of Adam's emotional functioning was based on interviews with the psychologists who worked with the family and on a play session with Adam conducted by Ms. Bressler. Dr. Lafiosca testified that Adam is limited in his ability to respond to, interact and communicate with others. According to Dr. Lafiosca, Adam's behavior is noticeably less appropriate in an unstructured setting.

Dr. Lafiosca testified that Ms. Bressler's conversations with Dr. Dignault indicated that the family had been cooperative in attempting to use typical behavior management techniques with Adam, but that these methods had been unsuccessful. According to Dr. Lafiosca, the evaluation team at Franciscan Children's Hospital strongly believed that Adam needed a residential setting. Dr. Lafiosca noted that in the past there had been no coordination of intervention efforts with Adam. In Dr. Lafiosca's opinion, Adam needs a consistent setting over all the hours of the day. He needs a high degree of practice and repetition to enjoy learning and transfer it from one situation to the next. According to Dr. Lafiosca, the IEPs written in May, 1988 and January 1989 (Exh. P-9 and P-10) overlooked issues such as Adam's need for behavioral control and functional academics. In Dr. Lafiosca's opinion, intervention methods listed on the IEPs are too general, and a coordination of services is lacking.

Dr. Lafiosca did not meet Adam or his mother or visit any classroom in New Bedford. She noted that reports of staff who observed Adam on the inpatient unit at Franciscan indicate that Adam's interaction with other children was poor. Dr. Lafiosca testified that she would have expected Adam to make more progress in toilet training, communication skills, functional skills and safety awareness. Dr. Lafiosca emphasized the critical importance of an integrated coordinated approach with Adam, and noted that coordination of services has been consistently lacking in his programming.

16. A physical therapy evaluation of Adam was conducted by Kateri Constain at Franciscan Children's Hospital on August 1, 1989. (Exh. P-3) According to Ms. Constain, Adam was cooperative during the evaluation sessions. He attempted to do all activities presented to him and persisted when he could not succeed. He was not hyperactive or distractible. Adam spoke very little and was extremely difficult to understand when he did speak. He said "yes" to everything, even when he did not appear to know what was asked. Adam followed only simple one step

commands, and the few activities he did do were done after demonstrations.

Ms. Constain reported that Adam has an awkward wide-based gait pattern. His hips and shoulders are level and his spine is clinically straight. Adam's passive joint range of motion is within normal limits, and his gross muscle strength is adequate for daily needs. Ms. Constain could not formally assess Adam's muscle tone, but she reported that it appears to be within the normal range.

The evaluation indicates that Adam has delayed gross motor skills. He did not seem to understand what was wanted at times even after demonstrations were given. The few activities that Adam did try were clustered around a five year old level. At all times the quality of Adam's performance was awkward, with excess postural adjusting and arm and hand posturing. Tremor, decreased speed and excess synkinesia was noted when Adam attempted thumb to finger opposition. He was unable to do most of the activities presented to him. Ms. Constain found that Adam has a delayed gross motor system and recommended that he be seen in a small structured adapted physical education class geared to his level.

17. An audiological evaluation of Adam was conducted by Kathleen Loftus West, Assistant Director for Audiology Services, at Franciscan Children's Hospital on July 31 and August 2, 1989 (Exh. P-5). Ms. West's findings suggest that Adam's hearing sensitivity is within normal limits bilaterally. His single word discrimination abilities are good in a quiet listening situation bilaterally. Results of typanometry indicate that Adam has normal middle ear function bilaterally. Ms. West did not recommend any audiology services for Adam.

18. A Speech-Language Pathology evaluation was conducted by Margot Widan, Speech-Language Pathologist, at Franciscan Children's Hospital on August 3, 1989 (Exh. P-6). Ms. Widan describes Adam as a cooperative child who is very immature for his age. Adam was lethargic and passively involved during the evaluation, and needed maximum structure to help his focusing and auditory and visual attention. Ms. Widan found that Adam's receptive and expressive language skills are significantly delayed for his age, clustering at the late 2 to 3 year level. Adam's knowledge and use of all aspects of language was impaired. His expressive language abilities were further compromised by poor speech intelligibility. Multiple sound substitutions and omissions were noted at the word level and in spontaneous speech. According to Ms. Widan, Adam 's speech intelligibility was moderately to severely reduced in unknown contexts. Oral-motor planning problems impacted on Adam's sound productions and phonological processes. Visual cuing and modeling did not sufficiently stimulate improved sound production for Adam. According to Ms. Widan, the prognosis for improvement in speech and language skills for Adam is guarded, given the extent of his deficits, his age and the need for maximal structure and cuing.

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Ms. Widan's recommendations were as follows:

"1. The evaluation team at Franciscan Children's Hospital have recommended continued placement for Adam in a small, highly structured, substantially separate classroom with a low student to teacher ratio. It was also strongly recommended that Adam be placed in a highly structured, 24-hour living environment where his therapeutic interventions can be coordinated.

2. Speech-Language intervention should continue two to three times weekly both on an individual basis and in a small group with ... appropriat[ely] matched peer[s]. The following general goals should be addressed;

- Increase functional vocabulary and basic concept knowledge and use as related to academic material covered in the classroom.

- Develop expressive form.

- Improve speech intelligibility by directly addressing phonological skills.

- Improve pragmatic language skills in a group setting with a peer. Develop appropriate use of language to enhance verbal/social interactions.

If speech intelligibility does not improve given intensive intervention over a prolonged period of time, Adam should be considered as a candidate for an augmentative communication evaluation. This would evaluate the possible effectiveness of a non-vocal communicative system to supplement (augment) his verbal expression - using high or low technology devices.

3. In addition, the Speech-Language Pathologist should consult once weekly to Adam's teacher, to plan coordinated language goals, to review Adam's progress and to discuss methods for carry-over of newly acquired skills into the class.

4. The following style accommodations are suggested for the classroom in order to help improve Adam's listening attending skills and improve his comprehension of oral directions:

- Provide a listening set before presenting instructions, e.g. Prepare Adam for what is to follow by saying: "There are 3 things I want you to do...".

- Use simple vocabulary.

- Limit sentence length and complexity.

- Provide visual support with verbal instructions, e.g. Provide picture cues along with the spoken message.

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- Use a varied intonation pattern. Emphasize key words.

- Make sure you have Adam's auditory and visual attention before speaking. It is helpful to alert Adam by name and establish eye contact with him prior to giving him verbal instructions.

5. Adam should have a speech and language re-evaluation in 6 to 9 months to document progress and update therapeutic and educational recommendations.

19. An occupational therapy evaluation of Adam was conducted by Therese Adams at Franciscan Children's Hospital on July 31, August 1 and August 2, 1989. Ms. Adams described Adam as a "polite, helpful and very cooperative boy, [who] easily engaged in all activities presented to him and maintained adequate task focus." During the evaluation Adam's spontaneous speech was limited and the intelligibility of his speech was poor. Adam had difficulty understanding some simple questions and was noted to drool during challenging tasks.

In sensimotor skills, Adam demonstrated an adequate ability to motor plan simple upper extremity movements, but had difficulty planning sequential finger movements even with visual monitoring. His shoulder stability was reduced and tone was low in his upper extremities. Trunk weakness was noted in Adam's difficulty maintaining antigravity postures. Adam was able to identify all his body parts readily and his vision appeared functional for all testing.

In fine motor skills Adam's upper limb speed and dexterity was placed at the 4 year 2 month level on the Bruininks-Oseretsky Test of Motor Proficiency. His grip strength was severely reduced and his pinch strength moderately reduced in both upper extremities. Functionally this limits Adam's ability to manipulate such things as fasteners, door knobs, tight jar lids, and so forth. Adam exhibited tremors during challenging fine motor tasks, had difficulty with sissor control and had difficulty executing translation movements of his fingers.

In visual perception skills Adam was able to sequence 4 step pre-vocational tasks with physical structure with an initial model only. He could sort by two variables simultaneously, count to twelve and identify primary colors and basic shapes.

In visual motor skills Adam scored 4 years 4 months on the Beery Developmental Test of Motor Integration. According to Ms. Adams, Adam's errors appeared immature yet commensurate with his other testing and overall cognitive abilities. On the McCarthy Scales of Children's Abilities, Adam scored at the 3 year level for puzzle solving and at the 6 year level for block building. Ms. Adams felt that Adam's poor vision may have impacted somewhat on his performance on the puzzle solving subtest. Adam could print his name with consistently sized, spaced and shaped upper and lower cased letters.

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In functional skills Adam had difficulty manipulating all fasteners (i.e. buttons, snaps, zippers) and was unable to tie his shoes. He could correctly orient clothing on himself, cut with a knife and fork and set a table.

Overall, Ms. Adams found that Adam functioned between the late 3 year and middle 4 year level on all measures of performance. Adam's relative strengths are in social skills and ability to learn new skills. Ms. Adam's concluded that Adam would benefit from individual occupational therapy one time per week and should then move to in-classroom treatment during fine motor, gross motor and self care training. Ms. Adams indicated that methods of teaching Adam particular skills could be formulated and reinforced in accordance with his particular learning style. She suggested that when Adam is learning manipulation of fastners, his teacher should begin by breaking up tasks into small and separate steps, then start with the last step and move systematically forward. Ms. Adams also noted that Adam is able to do tasks with 4 steps, and suggested that this should be considered when teaching him lengthy activities.

20. An educational evaluation of Adam was conducted by Sarah S. Barnicle, Education Specialist, at Franciscan Children's Hospital on July 31, 1989 (Exh. P-8). The results of the informal pre-reading and pre-math assessments conducted by Ms. Barnicle indicated that Adam was functioning at readiness level in academics. Of the pre-reading skills that children learn in kindergarten, Adam could identify many capital letters and common colors. Difficulties were noted in related readiness skills including letter identification, alphabet recitation, letter detail, orientation and sequence, sound-symbol association and rhyming. Relative strengths for Adam were his basic understanding of books, his number recognition and his one to one counting.

According to Ms. Barnicle, the Evaluation Team at Franciscan found Adam to be a cooperative and often affectionate child with multiple developmental delays and visual difficulties which qualify him as being legally blind. Ms. Barnicle reported that cognitively, Adam is functioning at a moderately to severely deficient level. His fine and gross motor skills range from the two to the late four year level. Adam was found to have oral-motor planning difficulties which account for his often unintelligible speaking style and a 2 to 3 year age level expressive vocabulary. According to Ms. Barnicle, the results of academic testing concur with these results, showing that Adam is functioning at the beginning to early kindergarten level. Ms. Barnice's recommendations were as follows:

1. The Evaluation Team recommends that Adam be placed in a specialized psychotherapeutic residential program for children with similar cognitive, behavioral and learning needs.

2. If this placement is not available, the Team recommends

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placement in an extended psychotherapeutic day program which provides maximum structure, an integral behavior management program and functionally based academics and life skills training.

3. Academic instruction within a highly-structured small group setting is recommended. Instruction should be individualized, success-oriented, functionally based and multi-sensory in order to best meet Adam's learning needs.

4. Letter names, their associated sounds, and letter formation should be introduced, reviewed and practiced in a systemic way. The Team recommends use of a multisensory approach in which Adam sees, hears, names, provides the sound and writes letters.

5. Adam could also begin to learn word recognition for basic sight words, color words, names, safety and sign words (e.g., danger, stop). Words could be introduced as labels associated with pictures or signs. Adam should keep a word box with his words and review them daily.

6. When children confuse letters, activities that emphasize the similarities and differences among letters are useful. Three-dimensional forms such as magnetic letters can be used for practice. Visual models such as an alphabet desk tape and number line are helpful so that children can check written work and readily correct letter reversals. Tracing and dot-to-dot activities might also help teach the correct formation and direction of letters.

7. Continued exposure to books and print is important for Adam to continue expanding his knowledge about concepts such as reading left-to-right, top-to-bottom and matching speech to print. Children learn concepts about print and books by hearing stories read aloud and by participating in language experience activities. Activities using Big Books are also helpful for teaching children these important concepts. These activities will continue to build Adam's language skills and knowledge about the world as well.

8. Each day Adam should practice sequences, such as the alphabet and days of the week. Recordings of the alphabet song and songs about other concepts provide useful practice.

9. Development of compensatory strategies for learning is recommended (e.g., asking for directions to be repeated, tasks to be demonstrated).

10. Individual or small group instruction in math is recommended. The instruction should focus on the use of concrete manipulatives to reinforce concepts and build skills sequentially towards more complex/abstract reasoning.

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11. Activities that involve practicing the counting sequence and learning one-to-one correspondence are recommended. Games, rhymes, and songs which feature the counting sequence or the counting of objects will help Adam master these skills.

21. Adam's Discharge Summary from Franciscan Children's Hospital was completed by Dr. Joseph Jordan, Attending Physician (Exh. P-4). Dr. Jordan's assessment indicates that at the time of Adam's evaluation at Franciscan, he was a nine year and one month old male, who was legally blind due to aniridia, and who was functioning in the moderately retarded range with overall functioning primarily at the three to four year level. According to Dr. Jordan, Adam's interpersonal skills are severely limited and he exhibited inappropriate affective responsiveness. On the Evaluation Unit Adam demonstrated self stimulatory behaviors, intrusiveness, and the need for a high degree of supervision. Dr. Jordan noted that Adam has not yet acquired the ability to socialize and be compliant within a usual household situation. In the home setting, behavioral outbursts with negative behaviors remain notable for Adam. Dr. Jordan's discharge diagnosis is as follows:

1) Cerebral dysfunction, probably prenatal in etiology manifested by moderate intellectual retardation (full scale IQ equals 42; cognitive functioning at a three to four year level); in addition to severely limited interactional skills associated with inappropriate affective responsiveness.

2) Aniridia is also present and associated with legal blindness.

3) Adam's EEG reveals bilateral centrotemporal spikes which appear benign in nature, but do indicate the presence of a seizure diathesis.

The recommendations given on Adam's discharge diagnosis are as follows:

"Adam now manifests severe deficits in interpersonal interaction, as well as social functioning. This combined with his cognitive difficulties and visual disturbance has thus far been poorly compensated. His ability to adapt to his home environment remains extremely limited. Educationally significant growth in basic reading, spelling and arithmetic is not to be expected and the major goals of education must be that of environmental adaptation with regard to both interpersonal interaction, as well as safety awareness activities. It is evident that in order for Adam to develop adequate relatively independent life safety and social skills, placement in a program able to provide around the clock training and supervision is essential."

22. In September 1989, Adam entered the Chart III classroom taught by Mary Gleghorn at the Hadden McFadden School. This placement was made in accordance with the IEP drafted on January

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25, 1989, as modified by the mediation agreement of May 30, 1989.

In approximately early November 1989, the reports resulting from the evaluations conducted at Franciscan Children's Hospital were forwarded to New Bedford, and a Team meeting was scheduled to take place on November 20, 1989. In preparation for that Team meeting, Mary Gleghorn, Chart III classroom teacher, and JoAnne Butler, Teacher of the Visually Impaired, completed Special Services Educational Assessments, and Lynne Chapman completed a Speech, Hearing and Language Evaluation.

According to Ms. Gleghorn's November 1989 report, Adam had begun the Stevenson Reading Program and was beginning to identify sound/symbol relationships. He was reading "oa" words (i.e. goat, load) with the help of associated cues. Adam was also doing dictation skills using these words and sounds. Ms. Gleghorn reported that Adam was a good boy in school, and that his attention span had increased in group activities. When working independently, Adam worked longer with 1:1 supervision. Ms. Gleghorn described Adam's gross and fine motor skills as fair, and indicated that sissor and printing activities must be increased. According to Ms. Gleghorn, Adam could sit quietly listening to a story, but could easily be distracted by other students. Adam would reattend with verbal prompts. Ms. Gleghorn reported that using associated cues and a multisensory approach, Adam had done exceptionally well on memory tasks. His social relationships were described as good. Ms. Gleghorn recommended that Adam continue in the Chart III classroom placement with the addition of a one-to-one aide to maximize his learning potential.

Ms. Butler's November 1989 assessment indicates that Adam could match colors, letters, numbers and shapes with no problems. He could visually match sequential patterns and write his name independently, although his letter formation was inconsistent. According to Ms. Butler, Adam could cut a straight line and could discriminate details if encouraged to look carefully at a task. He could do 8 piece puzzles, and had some difficulty with spatial relationships. Ms. Butler described Adam as very cooperative and eager to please. His attention span was good in a 1:1 situation, although he could be distracted by auditory stimuli. According to Ms. Butler, Adam's fine motor skills were weak and his activity level on tasks was slow and careful. Adam's receptive skills were good, his speech could be difficult to understand at times but was improving. According to Ms. Butler Adam's visual memory skills are a strength. On the Motor-Free Visual Perception Test, Adam was able to perform all basic perception tasks, but had difficulty with more detailed items in all areas. On the Visual Sequential Memory Test he had difficulty with cursive examples. Ms. Butler recommended continued placement in the Chart III classroom with services of a teacher of the visually impaired provided in three 30 minute sessions per week to increase visual motor and visual perception skills.

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Ms. Chapman's November 1989 evaluations indicates that Adam's hearing acuity is within normal limits according to the results of the Franciscan Children's Hospital evaluation. Ms. Chapman reported that Adam's articulation development is characterized by multiple sound substitutions, omissions and additions. His speech is difficult to understand when the context is unknown. According to Ms. Chapman, Adam has a high palatal arch and has difficulty performing speech motor activities. The speed and range of movement of Adam's articulators is reduced, and inconsistent drooling is present. Adam received an age equivalency score of 4.7 years on the Receptive One Word Picture Vocabulary Test. His auditory reception skills were good and he was able to follow one and two step directions. Adam achieved an age equivalency score of 3.4 years on the Test for Auditory Comprehension of Language and a score of 3.6 years on the Expressive One Word Picture Vocabulary Test. Ms. Chapman reported that Adam speaks in utterances of one to four words in length, his sentence structure is telegraphic and reflects limited vocabulary development and difficulty in constructing complete utterances. Adam demonstrated fair pragmatic skills for Ms. Chapman. He established eye contact but sometimes had difficulty maintaining it. Adam was able to greet others, initiate and respond to greetings and identify himself. His voice qualities were within normal limits and no dysfluencies were noted. According to Ms. Chapman, Adam was cooperative and enjoyed working in a small group setting. Ms. Chapman found that Adam demonstrated significant articulation deficits and delayed receptive and expressive language skills in the areas of vocabulary, semantics, morphology, syntax and pragmatics. She recommended that Adam participate in small group and individual speech and language therapy for three 30 minute sessions per week.

23. On November 20, 1989, a Team meeting was held and a program prototype 502.4 IEP was drafted. (Exh. P-1). According to that IEP the Team recommended that Adam "continue [his] current placement in a small structured class with age appropriate peers, with emphasis on ADL, socialization and functional academics." Under the new IEP, Adam would continue to receive three 30 minute sessions of speech and language therapy each week as well as three 30 minute sessions of visual training with a teacher of the visually impaired. The IEP calls for a weekly 15 minute consultation between Adam's teacher and an occupational therapist aimed at improving Adam's muscle tone, and also provides that Adam will receive the services of a one-to-one aide. In addition the IEP states that the school department will explore programs available to help the family deal with management of Adam at home and will provide Mrs. C. with information regarding available respite care.

On December 11, 1989, Mrs. C. rejected the program prototype and location of services portions of the IEP produced on November 20, 1989.

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24. Mary Gleghorn testified that she taught the Chart III classroom which Adam attended during the 1989-1990 academic year. According to Ms. Gleghorn, the class contained 10 students ages 9 through 12, who were functioning at pre-readiness to readiness levels. Six of the students had Downs Syndrome, one had cerebral palsy, one suffered from seizures, and the remaining had some degree of retardation. Ms. Gleghorn testified that she had the assistance of one classroom aide and two 1:1 aides, one of whom was assigned to Adam.

According to Ms. Gleghorn, the students in her class arrived at 8:30 a.m. and departed at 2:00 p.m. She described the general program for her class as follows. The students lined up outside the classroom door and entered the class one at a time. Each child hung up his or her coat then sat down with folded hands until all of the students had entered the classroom. Ms. Gleghorn then took attendance and lined the students up to go to breakfast in the cafeteria. After breakfast the children went to the bathroom then lined up to return to the classroom. Again the students entered the class one at a time and sat down until everyone had entered. One child then placed the chairs in a circle and the children were called one at a time to the circle. Ms. Gleghorn sang a morning song with the students, then they reviewed days of the week and months of the year, as a group then individually. Ms. Gleghorn then discussed the weather, then had the students identify colors and color words.

After this the class turned to the Stevenson reading program. They reviewed letters and their sounds, practiced writing associated cues on the board, then read sentences, using words they had learned and remembering the associated cues. The class then moved on to counting by rote as a group then individually, followed by a math activity such as identifying and counting coins. After this Ms. Gleghorn conducted a memory activity and a language activity. Then the class worked on form boards for lacing, buckling, and so forth. The students were then dismissed from the circle one at a time, and returned to their seats to do independent work. During this time Ms. Gleghorn might work with one or two students on reading, or with another student on toileting, etc.

According to Ms. Gleghorn, the students in her class stayed together during the day, except during individualized services such as occupational therapy and physical therapy. Regular education 5th grade students were in the cafeteria when Ms. Gleghorn's class was having lunch, and some of Ms. Gleghorn's students went on field trips with the other 5th graders. Ms. Gleghorn indicated that there was no unstructured time in her classroom, and that the least structured time for her students was in gym class where they were allowed to engage in moderately unstructured play.

After independent work, the students lined up to go to the cafeteria for lunch. Ms. Gleghorn stayed with the students during lunch. Some of the students could eat without help, and

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Ms. Gleghorn worked on teaching the other children feeding skills. When the students finished their lunch they returned to the classroom and Ms. Gleghorn took her lunch while the aides worked with the students on independent activities such as stringing beads. When Ms. Gleghorn returned, the class worked on projects focused on teaching the students how to follow directions, such as a directed art lesson or cooking lesson. The children in wheel chairs left the class at 1:35 p.m., and the other children began preparing to leave at 1:45 p.m.

Ms. Gleghorn testified that by the end of the school year Adam could count from 1 to 25 with prompts from 14. Adam could recognize a penny and nickel, and could say his name and the name, but not the number, of his street. He could repeat his phone number, but could not recite it from memory.

Adam's individual work included matching pictures and words, cutting and pasting, adding with pegs and sticks, matching letters, identifying and printing numbers and identifying concepts such as opposites. According to Ms. Gleghorn, a 1:1 aide usually worked with Adam during independent work time. Adam was easily distracted and would not proceed from one task to the next without direction. Ms. Gleghorn testified that Adam completed most of his Stevenson worksheets correctly, but noted that his 1:1 aide gave him associated cues and without this assistance Adam's success rate would be lower.

Adam saw a vision therapist and a speech therapist three times a week. He received his vision services alone and his speech services with 2 to 3 other students. Ms. Gleghorn testified that it was not necessary for her to adjust her program to deal with Adam's vision or speech handicaps. According to Ms. Gleghorn, Adam had speech difficulties and could be difficult to understand. While he often spoke in phrases, Adam had some success developing sentences.

Ms. Gleghorn testified that she spent approximately one hour per day teaching daily living skills. Four times a week Ms. Gleghorn worked on survival skills such as reading signs, identifying stop and go signals on a traffic light, identifying mens and ladies room symbols, poison symbols and so forth. Ms. Gleghorn instructed her class on use of the telephone, the function of police and firefighters, what to do in emergency situations, etc.

Ms. Gleghorn testified that she met Adam's mother at a CORE meeting at Polasky School in January 1989, and that Adam's mother and grandmother made one visit to her classroom and attended a Team meeting in November 1989. Ms. Gleghorn had no verbal contact with Mrs. C. after the November 1989 Team meeting.

Ms. Gleghorn completed semi-annual progress reports for Adam, and sent all parents a monthly letter describing class activities. She did not send home any individual notes regarding

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Adam's progress. Ms. Gleghorn testified that Adam had participated in two field trips and would be participating in another one before the end of the school year. According to Ms. Gleghorn the junior high component of the Chart program, Chart IV, has a more extensive community orientation program (grocery shopping, trips to the library, etc.).

According to Ms. Gleghorn, Adam never had a bowel movement during the school day. He was not receiving any occupational therapy services. Ms. Gleghorn testified that Adam had become less timid when speaking and made more attempts to verbalize. In September Adam was shy and used mostly single words to express himself. By the end of the school year Adam was using phrases and sentences. According to Ms. Gleghorn, Adam acted appropriately in the classroom and was considerate of other children. Ms. Gleghorn recalled only two incidents of behavioral problems with Adam. On one occasion he threw his glasses on the floor, and on one occasion he pushed another child in gym class. On both occasions Adam immediately responded to verbal instructions to correct his behavior. Ms. Gleghorn testified that she uses a time out procedure to deal with students' behavioral problems, but never had to use this procedure with Adam. Adam did not need to be disciplined in class and never exhibited noncompliant behavior. Ms. Gleghorn indicated that the only difference she had noticed since Adam had begun taking mellaril was that his tremors were not as severe.

When asked to summarize the improvements that Adam had made over the course of the academic year, Ms. Gleghorn responded as follows: In September Adam could count from 1-10, at the end of the year he could count to 25 with prompts. At the beginning of the year Adam knew some colors, but not grey, white and pink, by May he knew all of his colors and color words. In September Adam spoke in words, by the end of the year he used phrases and rudimentary sentences. At the beginning of the year Adam was shy and kept to himself, by May he talked to other children and initiated more interaction with them. In September he needed assistance with brushing his teeth and washing his face and hands, at the end of the year he completed these tasks by himself. At the beginning of the year he had to be asked whether or not he needed to use the bathroom, by May he was able to identify this need himself. Adam made progress in the Stevenson reading program, responding well to the use of associated cues. In September Adam knew his first name, at the end of the year he knew his full name.

Ms. Gleghorn recalled that the Franciscan Children's Hospital report was discussed at the November Team meeting, but did not remember if the recommendations from that report were used in drafting Adam's IEP. Ms. Gleghorn testified that she reviewed the Franciscan report and felt that her classroom provided the services described in it.

25. Adam's mother, Mrs. C., testified that in the Chart III program Adam is supposed to be learning addition, how to read

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words, and how to identify days of the week, months of the year and letters. The only difference that Mrs. C. has noticed since Adam entered the Chart III classroom is that he can now print his last name. Adam has not read words or done addition at home, and he has no idea what a dollar, quarter or dime is. According to Mrs. C., Adam's speech is no clearer, he still misses letters in the alphabet and cannot count past the number 12.

Mrs. C. testified that she did not know what work Adam was doing in daily living skills in the Chart III program. According to Mrs. C., Adam has no understanding of safety outside of the home. He understands concepts such as the stove is hot and matches burn, but does not know enough to do such things as look for cars before crossing the street. Mrs. C. testified that Adam has been on a couple of field trips, but she expected that he would be taken outside of school more frequently. According to Mrs. C., when she lays out Adam's clothes he can dress, however he cannot button his pants, has a hard time snapping, and cannot tie his shoes. Adam can do his shirt and can zip when the zipper is ready. He can go to the bathroom by himself, but needs help cleaning up after a bowel movement. Adam can brush his teeth, but needs help with washing. He is able to use a spoon and fork, but cannot cut with a knife and cannot pour liquid because of his tremor and poor eyesight.

Mrs. C. testified that she has had ongoing behavior problems at home with Adam. He has refused to listen to anyone, gotten violent, thrown himself on the floor, kicked, hit his head, destroyed rooms, gone at glass, spit, attacked the cat, run into the street and thrown himself on the pavement. According to Mrs. C., it seemed that nothing would set Adam off on a tantrum. She tried to get his mind off whatever was troubling him with a reward system. For example she would offer activities such as coloring, watching T.V. or eating food. This would work for a few minutes, then Adam would go off again. According to Mrs. C., other methods of behavior modification were unsuccessful. Making Adam sit for 10 minutes did not work, and leaving him in a room alone until the tantrum was over seemed too severe, because Adam did not understand why he was being put in the room and might continue the tantrum indefinitely. Mrs. C. testified that Adam had pushed her, but mostly did harm to himself or objects. He has not needed medical treatment for injuries caused during a behavioral outburst. Mrs. C. testified that it had become impossible for her to take Adam out in public because of his behavioral difficulties.

Mrs. C. began taking Adam to see Dr. Louis Roy, a psychologist recommended by the principal at Winslow School, in February 1985. Adam saw Dr. Roy weekly for approximately two years, and also met occasionally with Mrs. C. and with her live in boyfriend, Emerson, separately or with Adam. According to Mrs. C., Dr. Roy's services seemed more beneficial to the family than to Adam. Mrs. C. testified that Dr. Roy came to a standstill concerning handling Adam's behavior. In 1988, Mrs. C. took Adam to see Dr. Dignault, a specialist in working with

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autistic children. Dr. Dignault recommended that Adam be evaluated at Franciscan Children's Hospital. Mrs. C. told Dr. Dignault and Franciscan Children's Hospital that she was seeking a residential placement for Adam.

Mrs. C. testified that she was not aware of any behavior modification programs used at the school, and that as far as she knew Adam did not present any behavioral problems in school. According to Mrs. C., Ed Sliney was sent by the school to help her with Adam's behavioral problems at home. Mrs. C. testified that Mr. Sliney was supposed to begin working with the family in June 1989, but did not initially come to the home until October 1989. According to Mrs. C., Mr. Sliney only visited the home twice, once in October 1989 and once in February 1990. Mrs. C. thought that Mr. Sliney was supposed to come to the home once a week, but he never did so. Mrs. C. testified that Mr. Sliney's first visit lasted approximately 2 hours and he witnessed Adam throwing a tantrum. The second visit lasted approximately 1 hour and included a trip to Shaws with Mr. C. and Adam. According to Mrs. C., Mr. Sliney never gave her anything to help her in working with Adam. Mr. Sliney said he would write a report listing different behavior modification techniques, but he did not do so. Mr. Sliney told Mrs. C. about the reward system that she had already been using without much success for several years. Mrs. C. did not tell the school about her dissatisfaction with Mr. Sliney.

For approximately the last two years Mrs. C.'s mother, Mrs. G., has taken care of Adam every day from after school into the evening. This arrangement was made because of Adam's increasingly difficult behavior around his mother. In addition, Mrs. C. has a respite care worker who takes Adam on Saturdays from 10 a.m. to 5 p.m. approximately eight months out of the year. According to Mrs. C., Adam's behavior is much better when he is with people outside of the immediate family. He has not presented any behavioral problems with his respite care worker. Adam was initially compliant when in his grandmother's care, but in late fall 1989 he became more difficult for her to handle.

In March 1990 Dr. Brink, a blood specialist, prescribed mellaril for Adam, 25 mg. in the morning and 25 mg. at night. According to Mrs. C., since Adam started taking mellaril, he has only had one behavioral outburst, and it was relatively brief. Mrs. C. testified that while the medication made life bearable at home, it has not improved Adam's learning capabilities. Mrs. C. is concerned about the side effects from long term use of mellaril, and does not want Adam medicated forever.

Mrs. C. testified that she has never observed Adam in school in New Bedford. She met Adam's teacher Mary Gleghorn before Adam enrolled in her Chart III classroom, and met her at at Team meeting, but otherwise has not spoken to her. Mrs. C. did not contact the school to discuss Adam's difficult behavior. Mrs. C. testified that she has not been able to work with her child and

that he does not reproduce his school work for her.

26. Adam's maternal grandmother, Mrs. G., testified that for the past two years she has taken care of Adam from after school until approximately 7 p.m. In nice weather Mrs. G. takes Adam to the park, and if the weather is not good they stay in and work on pre-school books. With his grandmother, Adam works on such tasks as tracing letters and grouping similar items. Mrs. G. uses large letters with Adam because of his vision problems and also uses a pencil with heavier lead that was sent home by Adam's teacher. Mrs. G. testified that she has not seen an improvement in Adam's abilities. He continues to work on the same level books, cannot get completely through the alphabet, needs help with numbers beyond 20 and his coloring skill has deteriorated. According to Mrs. G., the areas of most improvement for Adam have been in washing and dressing himself. Mrs. G. feels that Adam's speech and eating habits have become worse. Often she has difficulty understanding him and has to ask him to repeat himself three times.

According to Mrs. G., Adam can identify when he needs to go to the bathroom. He picks out what he wants to eat for dinner, and usually eats within his hands rather than with utensils. Adam can follow one or two word commands (i.e. close door, find juice), but according to Mrs. G. the commands cannot be multiple. Mrs. G. plays cards and sings songs with Adam. Adam watches some television programs, but does not understand the conversations.

Mrs. G. testified that Adam's behavioral problems became worse in late 1989. Initially he did not throw many tantrums when in her care, usually no more than one per month. More recently Adam began throwing tantrums with his grandmother once or twice a week. According to Mrs. G., during tantrums Adam throws himself down, pounds his glasses on the table, screams, throws objects and tries to run out of the house. Mrs. G. testified that Adam's tantrums could last an hour and she recalled one occasion on which a tantrum lasted two hours. According to Mrs. G.'s testimony, she has never discussed how to handle Adam's tantrums with a professional, and she usually waits out the tantrums.

Mrs. G. attended one open house at the school four years ago and went to one Team meeting approximately two years ago. She has not sent or received notes from school except to notify the school nurse of suspected illness. Mrs. G. testified that she has basically had no contact with the school for two years. She did not discuss Adam's increasing behavioral difficulties with the school.

According to Mrs. G., Adam's behavior is worse in his mother's presence. If mother and grandmother attempt to have a conversation in Adam's presence he throws a tantrum. Whenever the three of them are together, Mrs. G. has to focus completely on Adam.

Mrs. G. testified that they took Adam to see Dr. Dignault because they thought that Adam was autistic. Mrs. G. attended one meeting with Dr. Dignault, who indicated that Adam was not autistic, but discussed obtaining residential treatment for Adam. Mrs. G. testified that she feels Adam needs would have to be in long term residential treatment because he needs so much help.

Mrs. G. testified that Adam has been "an angel" since he started taking mellaril. Since the medication began he has not thrown a tantrum with Mrs. G. He does go to bed earlier when on mellaril. Adam now stays with Mrs. G. until 6 p.m., then goes home and goes to bed between 6:30 and 7 p.m.

27. Lawrence Melander, Supervisor of the Primary and Intermediate Programs at Perkins School for the Blind in Watertown testified that he had not met Adam or reviewed his file in depth. According to Mr. Melander, Perkins received a referral packet concerning Adam which included the November 1989 IEP, the Franciscan Children's Hospital reports and the most recent school progress reports. Mr. Melander testified that Adam was within the range of students that Perkins might serve. Prior to any admission decision, a multidisciplinary evaluation team at Perkins reviews a student's file, and staff conduct an informal meeting with the student. Adam had yet to be fully evaluated for admission purposes.

According to Mr. Melander, if Adam attended Perkins he would have to reside there during the week because of the distance between New Bedford and Watertown. There are 7 different programs at Perkins, but according to Mr. Melander, the only one that would be appropriate for Adam is the elementary program. Of the 40 students in that program, 60% are totally blind and the remainder have vision deficits. All of the students in the elementary program have additional impairments such as learning disabilities, hearing loss, orthopedic problems, or emotional problems.

Mr. Melander testified that there are 11 classrooms for students in the elementary program, including 5 classes with three students, 5 classes with four students and 1 class with five students. Two of the classes are team taught, the remainder have one teacher and one aide. Students are grouped according to age, language and academic abilities. According to Mr. Melander, the classes with fewer students contain younger or more impaired children who need more 1:1 assistance. In addition to their classroom teacher, the students in the elementary program work with a variety of specialized teachers in subjects such as physical education, crafts, music, and mobility, and have access to therapy in a variety of areas including speech and language, physical, psychological and occupational therapy. (See Exh. P-18) Students attend 50 half hour class periods per week. The basic curriculum of the elementary program is outlined in Exhibit P-18.

Most of the 19 residential students in the elementary

program at Perkins go home for the weekend on Friday afternoons. During the week the students get up at 7 a.m. and go to bed at 9 p.m., and all waking hours are what Mr. Melander called educational time. Houseparents and aides get the children up and help them get ready for school. The children learn to independently wash, brush teeth, get dressed, eat breakfast etc. The school day runs from 8:30 to 3:30, although sometimes therapies continue after 3:30. After school activities include field trips and cottage meetings. Safety, survival and socialization skills are taught in class as well as in the cottage setting.

Behavior management programs are used at Perkins. Dr. Melander testified that in cases of severe behavior difficulties, a psychologist will design a comprehensive behavior management program for a student, which is implemented after approval by the peer review team and discussion with parents. Behavior management programs can be implemented in class, in the cottage setting or both. According to Mr. Melander, Perkins holds a formal team meeting twice per year for each student. These meetings are attended by everyone who is working with the given student. In addition social workers and psychologists working with students have informal weekly meetings with teachers and with cottage staff.

According to Mr. Melander, family involvement with Perkins varies. Usually a social worker from Perkins spends extra time with the family when a student is first admitted, and the interdisciplinary team meets with parents approximately eight weeks after admission. At a minimum the social worker has monthly phone contact with parents, and sometimes the contact is weekly. Once per year a social worker and classroom teacher conduct a home visit over the weekend. Teachers and parents have contact on an as needed bases. There are two open houses for families each year, and parents can visit at any time so long as they notify staff in advance.

The students at Perkins engage in some off campus community activities, but generally prior to high school there are no significant contact with regular education students. Usually the elementary students participate in two field trips per month. Mobility teachers arrange trips to malls, police stations and so forth. The trips are a total learning experience, with students developing skills in getting places, asking for help, acting appropriately, etc. Students' length of stay in Perkins varies, but usually at least a two year period is needed for the program to be effective. The school year runs for 180 days and there is a five week summer program which most students attend.

Mr. Melander testified that approximately 7 of the elementary students have sufficient vision to use books of regular print with some degree of magnification. There are students who can use worksheets similar to those completed by Adam (Exh. S-3), although blue mimeograph is not used at Perkins because it is more difficult to see. Perkins does not use the

Stevenson reading method. All classroom teachers at Perkins are certified special education teachers. According to Mr. Melander, parent training in behavior management could be arranged at Perkins if parents were interested. Perkins does not usually provide services in the home. If a behavior management program is being used with a student, parents are informed about it and asked to employ the successful techniques at home.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence presented in this matter, I find that the 1989-1990 IEP proposed by New Bedford was not reasonably calculated to provide the maximum feasible educational benefit to Adam, and that the Perkins School for the Blind or a similar 502.6 program would be an overly restrictive placement.

There is no dispute over the fact that Adam is a child with severe handicaps. The evidence indicates that his intellectual functioning is in the moderately retarded range, his fine and gross motor skills are delayed, and he has significant deficits in the areas of vision, speech, language and cognition. There is no apparent disagreement over the fact that Adam has exhibited serious behavioral difficulties at home which have not surfaced in school.

The controversy in this case centers around whether or not Adam has made sufficient progress as a special needs student in New Bedford, particularly over the course of the last two academic years, and whether or not the services provided to him have been appropriate. It is worth noting that Adam's discharge summary from Franciscan Children's Hospital states, "educationally significant growth in basic reading, spelling and arithmetic is not to be expected, and the major goals of education must be that of environmental adaptation with regard to both interpersonal interaction as well as safety awareness activities."

The evidence shows that Adam's basic academic skills are at a readiness level, and that his progress in this domain has been slow. During Adam's last year in the Chart II program and his first year in the Chart III program, he demonstrated a slight improvement in counting ability, knowledge of colors and letters, ability to match and distinguish object characteristics, and name recognition. A review of school progress reports indicates that Adam made advances in his interactions with peers and expanded his use of phrases and rudimentary sentences. In addition he began responding to a formalized reading program, demonstrating an ability to utilize associated cues and identify sound/symbol relationships. School officials acknowledge that Adam works best with one on one assistance and that his performance level is enhanced by prompting.

Parent has not seen Adam's recent academic progress in part because of the striking lack of communication between home and

school. Parent has not been informed about what materials might be appropriate for use at home, how to assist Adam with his work, what advances to look for, and what methodologies are most successful. The lack of any sort of significant contact between teacher and parent is indicative of the school's general failure to integrate and coordinate services for Adam. This is a fundamental flaw in the planning for this child which must be remedied. Putting it aside for the moment, it appears that certain aspects of the Chart III program, such as repetitive practicing of sequences, instruction in word recognition, use of a multisensory approach and provision of substantial 1:1 assistance, have been appropriate and beneficial to Adam. Academic progress, though not extensive, is evident.

Adam has not made sufficient gains in daily living skills and safety awareness. Basic skills such as zippering, tying shoes, and cleaning up after toileting are not fully learned. Testimony from both parent and school officials indicates that Adam has not had enough exposure to the community and has not developed a working command of safety precautions.

As noted, the behavioral difficulties that seem to have pointed parent in the direction of a residential placement are not present in school. School officials consistently described Adam as cooperative and eager to please. Although the parent sought outside assistance at her own expense, her testimony suggest a misunderstanding of the proper use of behavior management techniques and an inability to use them consistently. From parent's brief description of her interventions with Adam, it would appear that his behavioral outbursts were inadvertently being rewarded. None of this excuses the school's failure to respond to legitimate concerns raised by the parent about Adam's problematic behavior. Adam's plan did not include an integrated behavior management program and the minimal "parent training" that the school provided was, at best, insufficient. This service was not coordinated with Adam's classroom program or monitored by the school, and was of little assistance to a parent anxious for help.

While certain beneficial services, such as speech therapy and visual training, have been consistently provided to Adam, coordination of services is again missing. For example, the teacher testified that she has no set time to meet with Adam's therapists and that no specific adjustments to the classroom have been made to accommodate Adam's vision and speech handicaps. There has been no ongoing contact between service providers and parent and no suggestions as to how to carry progress over to the home environment. Occupational therapy, a service that has been recommended and listed on Adam's IEP, has not been offered. It is somewhat unclear as to why counseling has not been a part of Adam's educational program. It appears that the counseling services offered by the school were not available in a timely fashion and that no transition period or consultation with Adam's private therapist was discussed or funded. Extended life skills training in the home seems necessary in order to properly address

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such areas as dressing and toileting, but no such service has been provided.

Absent a concerted effort to coordinate needed services in the local school setting, I cannot order that this child be placed in the highly restrictive setting of a residential program such as that offered by Perkins School for the Blind. If placed at Perkins Adam would lose the benefit of regular contact with non handicapped peers and guided exposure to his own community. Adam's school performance indicates that his behavior is manageable and he is capable of developing functional life skills in the less restrictive setting of a substantially separate classroom. Adam will only achieve the maximum feasible benefit from his education if he is offered an integrated service plan that extends beyond the school day. Regular communication among all of the individuals working with Adam, careful coodination of services and ongoing monitoring of Adam's progress are essential ingredients of successful programming. The aim must be to maximize the overall learning of a child who critically needs to develop the life skills that will enable him to function independently in the world.

New Bedford shall be responsible for a modified 502.4 placement with the following components: 1.) speech/language therapy and intervention as outlined recommendations of Franciscan Hospital Speech Pathologist (Exh. P-6), 2.) occupational therapy, 3.) adaptive physical education, 4.) vision services with teacher of the visually impaired, 5.) weekly consultation between classroom teacher and each service provider, 6.) educational goals and objectives focused on functional academics and life skills training with methodologies recommended by Franciscan Children's Hospital Education Specialist (Exh. P-8), 7.) behavior management program, 8.) parent training in behavior management including one hour per week of monitoring and assistance in the home, 9.) at least one hour per week of home instruction in daily living skills, 10.) individual and family counseling which shall be made available immediately and include at least one month of consultation and transitional services by current provider, 11.) home-school liaison to facilitate communication and coordinate services.

ORDER

The 1989-1990 IEP offered by New Bedford was not reasonably calculated to provide Adam with the maximum feasible educational benefit in the least restrictive setting. New Bedford shall immediately develop and implement an educational program which includes the components outlined in this decision.

Jane Lavoie (KRA)
Jane Lavoie
Hearing Officer

Date: March 18, 1991

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JAN 2 1991

In Re: Christopher A. BSEA #90-1132

COMPLIANCE DECISION

Pursuant to 603 CMR 28:411.0, a compliance hearing in the above-entitled matter was held on November 20, 1990 at the Massachussets Department of Education in Quincy, MA. The record remained open for written final arguments which were received on November 28, 1990.

Those in attendance at the compliance hearing were:

Richard A.	Parent
Kristen Reasoner Apgar	Director, Bureau of Special Education Appeals
Jacqueline Patterson	Director of Pupil Personnel Services, Stow Public Schools
Mary Ellen Sowyrda	Attorney for Stow Public Schools
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Parents' Exhibits labelled P-1 through P-7; a two-point stipulation of the parties read into the record and assented to by both parties; and approximately 2¼ hours of oral testimony.

BACKGROUND

On August 31, 1990 a DECISION was rendered in the above-entitled matter. That DECISION is totally incorporated herein, by reference. Parents then filed a MOTION FOR RECONSIDERATION which was opposed by the Stow Public Schools (Stow). On October 15, 1990 in a DECISION ON MOTION FOR RECONSIDERATION, also totally incorporated by reference, Parents' MOTION FOR RECONSIDERATION was DENIED. Meanwhile, on September 10, 1990, Stow had promulgated an Amendment to Christopher's Individual Education Plan (IEP) incorporating the Hearing Officer's ORDER from the original DECISION. (See P-8, 9, 10). Parent had rejected this IEP Amendment on September 13, 1990 (P-6, 7) and on September 22, 1990 had written to Stow delineating his reasons for rejecting the IEP Amendment. (See P-4). Subsequent to the DENIAL OF RECONSIDERATION, Parent requested this compliance hearing.

ISSUE IN DISPUTE

Has Stow complied with the Hearing Officer's ORDER issued at the end of the DECISION rendered August 31, 1990?

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STATEMENT OF POSITIONS

Parents' position is that Stow has not complied with the Hearing Officer's ORDER in that it has not implemented the ORDER and that it has denied Parents their procedural rights.

Stow's position is that it has complied with the Hearing Officer's ORDER, that it has implemented the ORDER and that it has not denied Parents their procedural rights.

FINDINGS AND CONCLUSIONS

At the conclusion of his 20 page DECISION, the Hearing Officer issued the following ORDER:

1. Stow's proposed IEPs for Christopher A. covering the time periods from 12/89 to 4/91 are appropriate to address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment.

2. Stow is ordered to record the services of the mainstream facilitator on Chris' current IEP either on the special education service delivery grid or under the Additional Information section of the IEP.

3. Chris should not be mainstreamed into a regular education industrial arts class without appropriate support if and/or when that class is to utilize dangerous tools or power tools.

4. Stow is not financially responsible for Chris' Carroll School placement.

In Stow's Amendment to Christopher's IEP (P-10), written to incorporate the Hearing Officer's ORDER, Stow's Special Education Director, Ms. Patterson, wrote the following under the section Updated Information and Changes:

> Chris will not be mainstreamed into a regular education industrial arts class without appropriate support if and/or when that class is to utilize dangerous tools or power tools. Hale Middle School is implementing a TECHNOLOGY EDUCATION class in 1990-91 in place of Industrial Arts.
>
> Upon Chris's return to Hale School, the mainstreaming facilitator will be in Chris's Science classes daily to begin with, then in Science and Social Studies on an as needed basis to insure an understanding of the curriculum and classroom expectations. The facilitator will consult with the regular education teachers and will modify the curriculum consistent with Chris's learning style and ability. When needed, academic support is available during the daily tutorial/enrichment period daily.

I conclude that Stow has substantially complied with the ORDER issued at the end of the DECISION rendered August 31, 1990. Stow has done what the ORDER required it to do. Stow did not literally follow 603 CMR 28:403.4 as written in the promulgation of its Amendment to the IEP to incorporate the Hearing Officer's ORDER. However, given the specificity of the ORDER and the broadness of the regulation at issue, such violation is held to be harmless error.

My analysis follows.

I.

Mr. A. contends that Stow did not comply with the Hearing Officer's ORDER. Mr. A. acted as advocate for Parents' position and called Ms. Patterson as his witness and the only witness called in this compliance hearing. Mr. A. declined to testify as a witness, despite being reminded by the Hearing Officer that he had a right to testify in his capacity as the Parent bringing this non-compliance action. Therefore, evidence to support Parents' allegations of non-compliance by Stow must be gleaned from Ms. Patterson's oral testimony and the documents/ stipulations presented. Essentially, Parents believe that Stow did not comply with the ORDER because Stow did not include many things Mr. A. thought it should include in its Amendment to Christopher's IEP. Such items are delineated in extensive detail in P-4. (See also testimony of Ms. Patterson). Parents also believe that Stow did not do any of the preliminary transitional work necessary before Christopher's return to Stow. (See page 10 of the original DECISION; testimony of Ms. Patterson).

Mr. A's documentation (P-4), final argument, and questioning of Ms. Patterson indicates that he believes Stow should have essentially rewritten Christopher's IEP incorporating virtually entire sections of the DECISION such as SCHOOL'S PROPOSED PROGRAM and FINDINGS AND CONCLUSIONS as well as additional things sought by Parents. He is incorrect. Stow's IEP and proposed educational program, as testified to at the original hearing, was found appropriate to address Christopher's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment in the original DECISION and ORDER. Stow was specifically ordered to do two additional things which it did via its Amendment to the IEP. Stow has complied with the ORDER issued at the end of the original DECISION.

An IEP is essentially a blueprint or framework to maximally address a child's special education needs. Christopher's Stow IEP is 20 pages in length, not counting the Amendment. Mr. A. desires even greater specificity. However, everything a child does or may do in each class and everything a teacher does or may do with that child in each class cannot possibly be spelled out in detail on any IEP. Further, a child does not exist in a vacuum or a static situation. Teachers must be allowed the

flexibility to teach and adapt to changing circumstances within the parameters of the IEP. While Mr. A. seeks even more specificity as a protection, such rigid and all encompassing specificity could become an educational straightjacket and ill serve the needs of a growing, changing child adapting to new and different demands. The preciseness sought by Parents is neither practical nor necessarily of maximum benefit to Christopher's growth and development. Indeed, I note that Carroll School, the private school that Christopher has attended for the last 3½ years, the private school which Parents contended at the original hearing and continue to argue now is the best possible placement for Christopher has never written an IEP for Christopher. There must be a proper balance between specificity and flexibility. By my original DECISION and ORDER I have concluded that, with the two additions ordered, Stow's IEP for Christopher achieves that proper balance.

Mr. A. also contends that Stow has not complied with the ORDER because it has not done the preliminary transitional work necessary for Christopher to return to Stow. Such transitional services included the following (See page 10 of the original DECISION quoting from the Additional Information Section of Stow's IEP for Christopher):

> Just prior to entering Hale Middle School, Chris will meet with the guidance counselor who will conduct a school tour, explain the schedule and gym and lunchroom requirements, as well as introducing Chris to a 6th grade buddy. He will be provided with a student handbook. The counselor will meet with Chris at least weekly for Chris' first month of school in order to facilitate his adjustment. Prior to his entry, the teacher of moderate special needs and the speech and language teacher will in-service the 6th grade teachers and specialists regarding Chris' learning style. Upon entering Hale, a base line testing will be done in language arts, reading and math to provide criteria referenced growth. The Brigance test will be used.

However, the parties have entered into the following two-point Stipulation:

1) The parties stipulate that Christopher has not returned as a student to the Stow Public Schools and remains enrolled at Carroll School;

2) The parties further stipulate that at no time did the A.'s, Christopher's parents, in any way, either in writing or orally, notify the Stow Public Schools that Christopher would be returning as a student to the Stow Public Schools.

The preceding two paragraphs create a contradiction. An IEP for a child and any transition for such child cannot be implemented if the child is not present to be transitioned or taught. This is also a fundamental flaw in Parents' non-

compliance action against Stow. Parents allege that Stow has not implemented the DECISION. But in order for Stow to be able to comply with the DECISION and implement its individualized education program for Christopher, Christopher must attend Stow's program. Similarly, for Parents to be able to demonstrate that Stow is not complying with the DECISION or implementing Christopher's program, Christopher must actually be in his Stow program. In the instant case, Mr. A. is contending that Stow is not complying with the DECISION and that Stow has not implemented Christopher's individual education program, while Christopher remains in a private program at Carroll School and has never attended Stow's proposed individual education program for him. Given such circumstances, I am unable to conclude that Stow has failed to comply with the DECISION.

Finally, Parents contend that Stow should have provided in-service training for Christopher's regular education teachers via his special education teacher and speech language therapist "prior to his entry" as stated on his IEP. Such in-servicing would be done specifically for Christopher pursuant to his individual education plan and logically assumes Christopher's return to Stow. Obviously, if Christopher is not going to attend Stow and function under his individualized education program, the sole purpose for such in-service training ceases to exist. Given that Christopher continues to remain at Carroll School and there has been no indication from Parents, either orally or in writing, that Christopher would return to Stow to function under his individual education plan; and given that the only indication that Stow has received from Parents is, to the contrary, that they continue to reject Stow's IEP for Christopher even as amended; I conclude that Stow has had no reason to in-service regular education teachers regarding Christopher's individual education needs. Mr. A.'s contention that if he had brought Christopher to Stow the day after receiving the DECISION without any notice to Stow such in-service training would not have been done defies both logic and common sense. "Prior to his entry" assumes knowledge that and when Christopher would enter Stow. However, if Mr. A. had acted in such a precipitous manner and deposited Christopher at Hale Middle School without any prior notice to Stow, Ms. Patterson testified that such in-servicing could have taken place very quickly.

II.

Mr. A. also contends that Stow has denied Parents their procedural rights in that Stow did not follow 603 CMR 28:403.4 which provides:

> The Administrator of Special Education and TEAM which completed the school evaluation shall write the IEP incorporating the decision of the hearing officer.

Stow acknowledges that no team meeting, which would have included Parents, was held to write the Amendment to the IEP and that such

Amendment was written solely by Stow's special education director. (See testimony of Ms. Patterson; P-10).

603 CMR 28:403.4 is written quite broadly. By its terms it assumes that an IEP needs to be written or rewritten as a result of a hearing officer's decision. This is often the case such as in the following situations:

1) When the school has written an IEP for a public school placement and the hearing officer finds that a private school placement is required to meet the student's special education needs;

2) Whenever a hearing officer orders that the student's physical placement be changed from that proposed by the public school;

3) When a hearing officer orders that a team be convened and an IEP written or rewritten to take into consideration further evidence not initially considered such as a just completed independent or private evaluation;

4) When a hearing officer orders that an IEP be written or rewritten to provide for extended day programming and/or extended year programming;

5) When the hearing officer orders the school to make extensive modifications to its program;

6) Whenever a hearing officer so orders.

However, there are also situations in which 603 CMR 28:403.4 is not applicable or necessary and no IEP needs to be written or rewritten such as in the case where a hearing officer finds the public school's program appropriate. In the instant case, the Hearing Officer found Stow's IEP to be appropriate but ordered two specific additions to the IEP pursuant to ORDERS' #2 and #3. While a technical reading of 603 CMR 28:403.4 may indicate that the TEAM should have met in this case, members of the TEAM, including Parents, would have had no discretion to expand, amplify or alter the IEP pursuant to Parent's wishes expressed in P-4. The ORDER was clear and specific. The Amendment to the IEP was written to reflect the ORDER. The only action the TEAM or the Special Education Director could have taken was to do what the ORDERS' #2 and #3 mandated be done. Ms. Patterson fulfilled a ministerial function and rendered no independent judgment in promulgating the Amendment to the IEP. The TEAM could have done no more. Therefore, any error committed by Stow constitutes harmless error. Parent's technical reading of 603 CMR 28:403.4 exalts form over substance and serves no valid purpose.

ORDER

Stow has substantially complied with the ORDER issued at the end of the DECISION rendered August 31, 1990.

Raymond Oliver
Raymond Oliver
Hearing Officer

Dated: January 2, 1991

MASS. DEPT. OF ENVIRONMENTAL AFFAIRS

42-111

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: CHRISTOPHER A. BSEA #90-1132

DECISION ON MOTION FOR RECONSIDERATION OF COMPLIANCE DECISION

On August 31, 1990 a DECISION was rendered in the above-entitled matter finding in favor of the Stow Public Schools (Stow). On October 15, 1990 in a DECISION ON MOTION FOR RECONSIDERATION, Parents' Motion for Reconsideration was DENIED. On January 2, 1991 a COMPLIANCE DECISION was rendered finding that Stow had substantially complied with the ORDER issued in the original DECISION. The original DECISION; DECISION ON MOTION FOR RECONSIDERATION; and COMPLIANCE DECISION are all totally incorporated herein, by reference.

On January 7, 1991 Parents filed a MOTION FOR RECONSIDERATION OF COMPLIANCE DECISION with accompanying memorandum. On January 10, 1991 the Hearing Officer wrote to Parent (with a copy to Stow) reminding Parent that he must notify Stow that he had filed this current motion by sending Stow a copy of such motion/memorandum. On January 30, 1991 Stow wrote to the Hearing Officer (with a copy to Parent) that at no time has Mr. A. served Stow with a copy of his request for reconsideration of the COMPLIANCE DECISION or any other documents regarding this matter. Stow requests a dismissal with prejudice.

RULING

I have carefully reviewed Parents' MOTION FOR RECONSIDERATION OF COMPLIANCE DECISION; Stow's REQUEST FOR DISMISSAL WITH PREJUDICE; and the three prior DECISIONS - original DECISION, DECISION ON MOTION FOR RECONSIDERATION, and COMPLIANCE DECISION - all rendered in the above-entitled case.

Parents' MOTION FOR RECONSIDERATION OF COMPLIANCE DECISION is DENIED.

Dated: January 31, 1991

Raymond Oliver
Raymond Oliver
Hearing Officer
Bureau of Special Education
Appeals

42-112

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

JUL 1 1991

In re: Melissa B. **BSEA # 90-1163**

DECISION

This decision is issued pursuant to M.G.L. c. 71B, 15, and 30A; 20 United States Code s. 1401 through s. 1461, 29 United States Code s. 794 and the regulations promulgated under these statutes. A hearing was held in the above-entitled matter on July 27, August 2, September 6, and October 15, 1990, at the Southeast Regional Education Center in Lakeville, MA. Those present for all or parts of the proceedings were:

Mr. and Mrs. B.	Parents
Herman Fishbein	Director, League School
Kathleen Florance	Speech-Language Pathologist
Cynthia Barkley	Cape Cod Association for Retarded Citizens
Margaret Bauman, M.D.	Pediatric Neurologist, Youville Hospital
Thomas Maloney, R.N.	Outpatient Coordinator, Youville Hospital
James Collins	Special Education Director, Wareham Public Schools
Melissa Drake	Counselor, Wareham
Caryn White	Program Director, Cape Cod Collaborative
Linda Gasquoine	Occupational Therapist, Cape Cod Collaborative
Ellen Oeffner	Teacher, Cape Cod Collaborative
Susan Waldman	Speech-Language Pathologist, Cape Cod Collaborative
Sharon Sawyer	Physical Therapist, Cape Cod Collaborative
David Phalen	Attorney for Parents
Regina Tate	Attorney for Wareham Public Schools
Lindsay Byrne	Hearing Officer, BSEA

The evidence consists of documents submitted by the Parents labelled P-1 through P-12, P-14, P-15, P-17, P-19 through P-42;*

*The parents' documents contained letters from persons with no demonstrated personal knowledge of the student, or of either of the proposed programs at issue in this matter. These letters were given no weight in reading this decision. (P-8, 9, 10, 11, 12, 14).

documents submitted by the school labelled S-1 through S-33; and approximately 21 hours of recorded oral testimony. Both parties submitted written closing arguments by November 8, 1990, and the record closed on that date.

ISSUES

1. Whether the 1990-1991 502.4 IEP developed by Wareham, calling for Melissa B's placement in a substantially separate class at the Cape Cod Collaborative, was reasonably calculated to provide the maximum feasible educational benefit to Melissa in the least restrictive setting? or

2. Whether a 502.5 placement at the League School is the least restrictive, appropriate educational placement for Melissa for the 1990-1991 school year?

PARENTS' POSITION

Melissa requires a highly specialized, intensive, twelve month educational program in order to prevent the regression typical of a child with Rett's Syndrome and to address the full range of her behavioral, physical, and cognitive needs. The Collaborative program offered by Wareham is inadequate because: it is a nine month school year program; it does not include necessary and beneficial services, such as music therapy and hydrotherapy; it lacks a specific focus on and attention to the complex needs attendant to a diagnosis of Rett's Syndrome. The League School offers Melissa a full year program in a classroom devoted exclusively to children with Rett's Syndrome, with the hydrotherapy and music therapy not available at the Collaborative. Therefore, the League School has the educational program which will assure Melissa's maximum possible development.

SCHOOL'S POSITION

Melissa has made progress, measured as maintenance of skills during a regressive stage of Rett's Syndrome, in a similar prior placement at the Collaborative. The 1990-1991 program offered at the Collaborative provides teachers and therapists, who are familiar with Melissa and with the characteristics of Rett's Syndrome and meets the programmatic recommendations of Melissa's neurologist. To supplement the Collaborative's school year program, Wareham offers a six week summer component. The Collaborative/Wareham placement is the least restrictive, appropriate educational program for Melissa.

SUMMARY OF THE EVIDENCE

The parties agree on most of the pertinent facts, thus the evidence may be briefly summarized:

1. Melissa is a five year old girl with Rett's Syndrome. She has significant developmental delays in all areas, and may experience further deteriorations in current skills, particularly in the motor areas. Cognitively, Melissa functions at the six to ten month level, with some developmental skills ranging up to the twelve month level.

Melissa's strongest skill is self-feeding at about the 18 month level. Melissa is non-verbal, with a 15-30 second attention span. She is ambulatory and has full passive range of motion. All of Melissa's skills are inconsistent. She demonstrates little interest in activities and, except for feeding, requires full physical prompting to perform any task. Melissa has characteristic Rett Syndrome behaviors that interfere with learning, such as pica, tantrumming, hand-wringing, rocking, self-abusive behaviors. (S-5; S-9; S-16; S-10, S-18; S-11; S-12; S-17; S-19; S-14; S-20-26; S-27; P-4; P-1-4; P-40; Testimony of Mr. and Mrs. B., Florance, Bauman, Casquoine, Waldman, Oeffner, Sawyer.)

2. Melissa needs a intensive, highly-structured, twelve month educational program, designed for children with significant developmental delays, substantial physical needs, and atypical interaction skills. The program should be behaviorally based, while able to respond to the constant gross and fine motor needs typical of a child with Rett's Syndrome. The focus of Melissa's program should be on maintaining her current skills and decreasing the frequency of her interfering behaviors. Melissa requires constant individual attention and supervision. In addition, she needs daily physical and occupational therapies, a communication program, and consistent behavioral interventions. All therapies should be integrated throughout the day and the curriculum, rather than presented in isolation. Melissa's educational program must include a home component to ensure consistency across settings. (P-1-4; S-20-26; S-9; Bauman, Oeffner; Waldman; Sawyer, Gasquoine.) There are no specific, individual recommendations in the record for either music therapy or hydrotherapy for Melissa.

3. Melissa has attended a substantially separate class at the Cape Cod Collaborative, since the spring of 1989 when she was 3 1/2 years old. During the 1989-1990 school year, she attended a preschool class six hours per day, and received ninety minutes per week of direct occupational therapy and thirty minutes per week of direct physical therapy. (S-19). Ellen Oeffner, Melissa's teacher, testified that Melissa's educational program focused on maintaining her skills and decreasing the frequency of interfering behaviors. A behavior plan was implemented, which, over time, succeeded in reducing the duration of tantrums, but not their frequency. (S-32). With the exception of tightened heel cords, Melissa maintained her skills over the course of the school, which her teachers and theerapists believed was good progress, given the progressive nature of Rett's Syndrome. Melissa even gained some skills, for example, when she entered the program in September, 1989, Melissa was not capable of performing any independent activity. By June, 1990, Melissa could put blocks in a container somewhat independently. (Oeffner).

During 1989-1990, the Collaborative class had seven students with various physical, behavioral and learning needs. Melissa was the lowest functioning student in terms of her cognitive and communicative abilities, as well as the intensity of her behavioral needs. Other students, however, required more attention from the physical and occupational therapists than Melissa did. There were at least four adults in the classroom at all times: two teachers and two

instructional aides. In addition, the speech, occupational, and physical therapists all spent significant amounts of time in the classroom, providing consultation and integrated service delivery in addition to direct service to individual students. A typical day for Melissa in the Collaborative Class was:

8:45	Asleep in bus on arrival. Awakened. Free time. Music. Fine and Gross Motor Tasks. Keep moving.
9:20	Group Circle Time.
9:45	Academics - short periods of table top work interspersed with walking. Stacking toys, simple puzzles, self-care skills.
10:30	Snack, outside recess, storytime.
11:30	Lunch, self-care.
12:30	Gym - A time to walk independently and safely.
1:00	Academics.
1:45	Snack.
2:00	Art - sensory experience
2:45 - 3:10	Departure Activities

There were no specific components of the school day that were designed for students with Rett's Syndrome. No changes in classroom methods of instructional techniques were made when the Collaborative staff became aware, in February, 1990, that Melissa had been definitively diagnosed with Rett Syndrome. (Oeffner). Sharon Sawyer, the physical therapist, recommended additional direct physical therapy to address increased heel cord tightening, as well as expected deterioration in mobility skills, as is usual with Rett Syndrome. The services were refused by the parents. (Sawyer). Susan Waldman, the speech/language therapist testified that she eliminated sign language goals for Melissa, when she learned of the Rett's Syndrome diagnosis, based on her understanding that Melissa's functional use of her hands would be severely limited. (See also testimony of Dr. Bauman). Ms. Waldman did not reduce her expectations concerning Melissa's progress and continued to work on developing a communication style with Melissa. (Weldman). Linda Gasquoine, the occupational therapist, stated that in April, 1990, she recommended an increase in the OT consultation time for Melissa, so that all service providers could be trained in appropriate range of motion activities. The recommendation was rejected by the parents. (Gasquoine).

Ms. Sawyer, Ms. Gasquoine, and Ms. Waldman had all worked with children with Rett's Syndrome prior to working with Melissa. All were familiar with the characteristics of the syndrome and the literature concerning it. All testified at the hearing that, within their respective disciplines, Melissa made progress commensurate with her potential over the course of the 1989-1990 school year. (Sawyer, Gasquoine, Waldman).

4. In February, 1990, Dr. Margaret Bauman diagnosed Melissa as having Rett's Syndrome (P-1). At about the same time the parents and the Collaborative staff learned of a new program being developed by the League School, designed to address exclusively the needs of students with Rett's Syndrome in March, 1990. The parents requested a

meeting with Wareham. (P-18, P-20, P-21). At the April 23rd meeting the parents requested placement at the League School. Dr. Collins, Wareham's special education director requested permission to re-evaluate Melissa. The re-evaluation was completed and the TEAM re-convened on June 14, 1990. Wareham offered a 502.4 placement at the Behavioral Intervention Class - Primary through the Cape Cod Collaborative. The IEP stated that the duration of the daily program was four hours, and the annual duration of the program was 180 days. There was no discussion of summer services at the TEAM meeting. The parents continued to request placement at the League School. The parents rejected the proposed IEP and requested a hearing. (S-5; S-30; S-10; S-11) S-12; Mr. and Mrs. B.; Collins).

Shortly after the TEAM meeting, the parents received an authorization form for Melissa's participation in a summer program. No other information about any proposed summer program was received. (S-31; Mr. and Mrs. B.). Melissa did not participate in an educational program during the summer of 1990. Melissa began attending the proposed Collaborative placement on September 26, 1990, pending the outcome of the hearing.

5. Karen White, then Program Director for the Came Cod Collaborative, described the 1990-1991 program offered for Melissa. The program is essentially a continuation of that attended by Melissa in 1989-1990. (See discussion at pp. 3). It operates for six hours per day, 180 days per year. Housed in Mashpee, the classroom would serve up to seven students (including Melissa) with severe disabilities of various types. The students range in age from 5 to 7 years old. There would be two teachers, including Ms. Oeffner, and two instructional aides present in the classroom at all times. In addition, a speech therapist (currently Susan Waldman who has worked with Melissa over the course of the last 18 months) spends three full days in the classroom, giving both direct individual therapy and consultation. The occupational therapist and the physical therapist each spend two full days in the classroom. All the therapists have prior experience working with children with Rett's Syndrome. They work in an integrated therapy model, using a transdisciplinary approach to providing services. All therapeutic services are done within the classroom and each staff person is trained to carryover the interventions in other contexts.

The Collaborative is committed to mixed disability groupings, due to its belief that each student has strengths from which the other students can learn. As in 1989-1990, Melissa would present the most severe behavioral needs in the group, but would fall in the middle of the group in terms of her physical therapy needs. Melissa does need constant one-to-one attention in order to learn. When she is alone she does nothing at all or engages in self-stimulating behaviors. Ellen Oeffner, who has been Melissa's teacher for the past 18 months, is responsible for ensuring that Melissa receives individual teaching. (White). Ms. Oeffner provides one-to-one teaching to Melissa for a minimum of four hours peer day. (Oeffner). Ms. Oeffner also provides the home component of the program, making weekly home visits, making school entries in the daily parent-school notebook, and telephoning when necessary. (White).

The Collaborative program is housed in a regular elementary school. Although direct mainstreaming is not contemplated for any of the students in Melissa's proposed program, there is consistent, informal contact with non-handicapped age peers, in the building, at recess, and at whole school functions. (White).

6. Ms. White explained that for all students enrolled in a Collaborative program, the Collaborative staff takes responsibility for assessing the student's strengths and weakness, recommending services to address those learning needs, and developing the IEP which reflects the student's learning goals and the services that will be provided by Collaborative staff. The Collaborative then sends the IEP to the student's local school district for suggestions, modifications, additions, etc., in consultation with the parents. The Collaborative staff does not develop IEP's detailing services that it does not provide. For example, while all of Melissa's service providers agree that she needs a twelve month program, the Collaborative staff would not write a 12 month IEP, since the Collaborative does not offer summer programming. (White). Dr. Collins testified that Wareham relies on the Collaborative to develop the entire IEP, and if Wareham provides any additional services they are not typically reflected on the "Collaborative IEP." He testified further that a summer program offered by Wareham would never appear on the IEP of a student, like Melissa, who attends a Collaborative program during the school year.

7. The League School in Newton is a private, Chapter 766 approved school serving primarily students with autism and related disorders. In July, 1990, it began a sub-program, aimed exclusively at serving children diagnosed with Rett Syndrome. This sub-program is approved to provide special education services by the Massachusetts Department of Education. (P-42; P-6; S-28). The school is located between 1 and 1 1/2 hours driving time from Wareham, depending upon speed, traffic and weather conditions. (Mr. and Mrs. B.; Collins; White).

Herman Fishbein, Director of the League School, described the program as a natural outgrowth of the psychoeducational, parent participation model of the League School. The Rett Program, operates from 8:45 - 3:00, four days a week and 8:45 to 1:00, once a week. It runs throughout the school year, except for the winter and spring holiday weeks and a three week vacation in July. The program is run on the integrated therapy model, where all individual therapies are conducted within the classroom. The classroom interventions focus on improving behavior and emphasize group process rather than individual attention.

Mr. Fishbein testified during the Rett Program's first week of operation, therefore much of his testimony concerned planned strategies and circumstances. He acknowledged that the League School had never taught a child with Rett Syndrome, prior to the opening of the sub-program. He also acknowledged that the League School had no experience teaching orthopedically-impaired students, had not used the services of a physical therapist before, and needed to make some

modifications in its physical plant to accommodate the physical needs of the children with Rett Syndrome.

The Rett Program planned to provide each student with a minimum of two hours weekly of direct occupational therapy, physical therapy, speech therapy, and behavior therapy. In addition it would provide each student with two sessions weekly of music therapy, adaptive physical education and hydrotherapy. Nutritional monitoring and a therapeutic feeding program would be provided by the school nurse, and medication consultation by the school psychiatrist. A home program would be designed for each individual child, depending on the needs of the family. The League School is committed to a homogenous group of students with Rett Syndrome, believing that teaching approaches and therapeutic interventions unique to the needs of children with Rett Syndrome will permit the students to make the most appropriate progress. All staff at the League School will be required to participate in a twenty-four hour training program on Rett Syndrome.

As of July, 1990, there were two students in the Rett Program. There was a head teacher, Mary Norman, and an instructional aide, Lynn Bishop, assigned full-time to the program. Neither had any prior experience teaching children with Rett Syndrome. In addition, a behavioral psychologist, a music therapist, a physical therapist, an occupational theraapist, two speech-language therapists, and an adaptive physical educator, provided direct and consultative services to the program on a part-time basis. By mid-October, there were four students enrolled in the program (with three additional students in the intake process). The teaching model had been changed to: head teacher, co-teacher, full-time certified occupational therapy aides, and an individual aide for one student, all full-time in the classroom. The people filling these roles, and their credentials, were not identified.

FINDINGS AND CONCLUSIONS

There is no dispute that Melissa B. is a student with special learning needs, as defined by M.G.L. ch. 71B and 20 U.S.C. 1401 *et seq.*, and is thus entitled to receive a free, appropriate public education. Similarly, the record reveals little disagreement about the nature of Melissa's learning needs, or the specific services necessary to address those needs. The dispute here centers on which of the proposed programs, the Cape Cod Collaborative's Primary Class, or the Rett Program at the League School, will provide the maximum feasible educational benefit to Melissa in the least restrictive setting. After careful consideration of all the evidence presented in this matter, and of the arguments of counsel for both parties, I find that the preponderance of the evidence support Melissa's continued placement at the Cape Cod Collaborative. I also find, however, that there are serious flaws in the 1990-1991 IEP, as presented to the parents, which require both procedural and substantive modifications in the program proposed by Wareham. My reasoning follows:

1. The evidence demonstrates that Melissa needs a full day educational program, which can address her behavioral concerns while

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providing intensive, on-going therapeutic support to maintain her skills and prevent the regression associated with Rett Syndrome. (See discussion at p. 2). Although the Collaborative staff had not seen Dr. Bauman's (the parents' expert) reports until the first day of hearing, their observations and recommendations were consistent with those of Dr. Bauman. The Collaborative staff recommended placement in the Primary program, a continuation of the intensive, therapeutic model in which Melissa had participated as a pre-schooler. Dr. Bauman, who has seen neither the Collaborative's nor the League School's proposed classroom, recommended the homogenous classroom at the League School, because "I assume they have a depth of expertise in Rett Syndrome." In fact, the record shows clearly that the greater expertise in teaching children with Rett Syndrome belongs to the Collaborative staff.

The Collaborative's Primary Class offers the program and services recommended by all evaluators, including Dr. Bauman, as being appropriate for Melissa. The record shows, unequivocally, that Melissa had maintained many skills. (maintenance being seen as progress during State II of Rett Syndrome, S-27; P-4) and had made progress in the areas of behavior and fine motor skills during her attendance in the substantially similar pre-school program over the course of the 1989-1990 school year. (Testimony of Oeffner, Gasquoine). Melissa's progress, along with the staff experience with students with Rett Syndrome, persuade me that the Collaborative is better able, at this time, to address Melissa's multiple and complex needs in a holistic fashion. In addition, I was impressed with the competence, knowledge, and committment of each of the witnesses on behalf of the Collaborative. I found their individual abilities to articulate the philosophy of the classroom, and discuss their roles within the educational model with specific reference to Melissa's learning needs, indicated a "depth of expertise" with Melissa that can only continue to benefit her.

2. The parents argue that the Collaborative Primary class is inadequate, because it does not offer Melissa music therapy or hydrotherapy. Both of these services are available at the League School. There is no indication in the record, however, that either music therapy or hydrotherapy, would be beneficial for Melissa. While the professional literature indicates that those services are typically used with children with Rett Syndrome (Bauman; Oeffner; Fishbein; Waleman; S-27; P-4), there is no professional evaluation supporting their efficacy for Melissa. Without such evidence, I cannot find that Melissa needs those services in order to make progress commensurate with her potential, nor can I find that proposed primary class inadequate because it lacks those services.

3. Furthermore, the proposed Collaborative primary class is less restrictive than the Rett Program at the League School. It is technically less restrictive, since it is designated as a 502.4 prototype, while the League placement carries a 502.5 prototype. (See, Ch. 766, Reg. 112.0). But the Collaborative class is also in fact less restrictive than the League School. First, since it is housed in a regular elementary school, it offers Melissa opportunities for real contact, albeit limited, with non-handicapped peers. The

League School can offer no such opportunities on a day-to-day basis. One of the primary goals of the Federal and State special education statutes is the integration of students with disabilities into the mainstream of public schools. Constant and continuous contact between students with disabilities and students without disabilities has incalculable educational benefits for both groups. This benefit provides the educational basis for the legal preference for the "least restrictive setting." Here, there is no persuasive evidence to support Melissa's placement in a more restrictive educational setting (the League School), when her learning needs can be appropriately addressed in a setting, which affords daily contact with regular education students.

Second, the Collaborative's Primary class serves the needs of students with various disabilities, while the League School concentrates on addressing the learning styles of students with one, low-incidence disability. The Collaborative class is thus internally less restrictive, exposing the students to a variety of learning strengths and skills. Its student composition reflects the Commonwealth's committment to non-categorical classroom, which require the teachers to meet the learning needs of each individual student as they are presented, rather than having a pre-set curriculum for students with "that type" of disability. While the parents argued in favor of the homogenuous disability grouping at League, no one at the hearing explained the educational advantages of such a grouping. There was no evidence that there were specific teaching techniques or therapeutic interventions that were so unique to students with Rett Syndrome that they could not properly or appropriately be used in a mixed group. I am not convinced, on this record, that there is any educational benefit to the individual students from placement in a classroom composed solely of students with Rett Syndrome. I could find nothing in the evidence to justify placement in this most highly restrictive of settings when appropriate services are availaable elsewhere.

4. The IEP proposed by Wareham does present two substantial flaws, which render it inappropriate as presented. First, it lacks a home component, an element identified as crucial for Melissa by all evaluators. While testimony indicated that Ms. Oeffner does indeed provide home consultation services, this is not reflected on the IEP. Home components and Parent-teaching components are critical aspects of IEP's and are subject to the same TEAM evaluation, assessment, goal and objective development, and parental consent requirements as any other part of a student's educational plan. (See Ch. 766, Reg. 503.1(j)). The IEP must, therefore, be amended to reflect the home services identified as necessary for Melissa by her TEAM, and to permit an opportunity for the parents to properly consent to those services.

More critically, the proposed IEP lacks a summer component. All witnesses agreed that Melissa requires twelve month programming to maintain her skills and prevent substantial regression. (Oeffner, Sawyer, Gasquoine, Waldman, White, Bauman). Failure to offer such services renders the proposed IEP inappropriate to meet Melissa's educational needs. (Oeffner, Sawyer, Gasquoine, Waldman, White,

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Bauman). Dr. Collins testified that it is Wareham's practice not to put summer services on an IEP developed by a Collaborative. (See p. 6). There is no justification or regulatory support for such a practice. The IEP must contain all of a student's educational services. The parents have the right to be informed of every educational service offered, and to have the opportunity to evaluate the offering and to accept it or reflect it, based on full discussion of the student's learning requirements and disclosure of the educational program characteristics. Melissa's parents did not have that opportunity here. Although Dr. Collins asserted that a summer program existed for Melissa in July and August, 1990, there was little evidence of what the proposed program consisted, and no showing that it was intended to or could meet Melissa's unique needs. Neither was there any credible evidence that the parents knew of the existence of an appropriate summer program for Melissa. Since the purported summer program was not discussed at the TEAM meeting and did not appear on the proposed IEP, there is nothing to indicate that Wareham considered it a necessary and integral component of an appropriate educational program for Melissa, as did all witnesses at the hearing.

At this juncture there is no appropriate remedy for Wareham's past failure to develop and implement an appropriate educational program for Melissa during the summer of 1990, but it is clear that Melissa requires full year programming in the future. Since the current, appropriate educational placement for Melissa operated by the Collaborative does not offer a twelve month program, it is Wareham's responsibility to develop and provide for summer services for Melissa, in consultation with her teachers, therapists, evaluators and parents. These services must provide levels and strategies of intervention, that are consistent with and continuations of those services, which have proven effective for Melissa. Wareham must design its program with sufficient timeliness as to allow the parents a genuine opportunity to assess it and grant or withhold consent to implementation for the plan. If Wareham is unable to develop such a program for Melissa, it must locate an existing educational placement which can offer appropriate full year programming for her, and seek the parents' assent to Melissa's enrollment there.

ORDER

The Behavioral Intervention Class-Primary - at the Cape Cod Collaborative, is the least restrictive, appropriate educational program for Melissa B. for the 1990-1991 school year. It offers services that are reasonably calculated to provide the maximum feasible educational benefit to Melissa in the setting which will afford her the greatest possiblee degree of contact with regular education students. The IEP proposed by Wareham is inappropriate in two respects and must be modified. Neither modification requires an immediate change in Melissa's placement.

1. The 1990-1991 IEP must be modified to include a home component. The TEAM meeting to discuss and draft this modification must take place no later than January 30, 1990.

2. The 1990-1991 IEP must be modified to include a summer

component of services equivalent to those received by Melissa during the school year of not less than eight weeks' duration. The TEAM meeting to discuss, design, or locate this program must be held no later than March 30, 1990.

Lindsay Byrne (ltr.)
Lindsay Byrne, Hearing Officer

January 18, 1991
Date

8/8/90

In re: Joshua F. BSEA #90-1181

DECISION

This decision is rendered pursuant to Massachusetts General Laws, ch. 71B, 30A, P.L. 94-142, and to the regulations promulgated pursuant to such statutes.

A hearing on the above-numbered case was held at the Central Office of the Department of Education, 1385 Hancock St., Quincy, Ma., and Newton City Hall, 1000 Commonwealth Ave., Newton, on March 22, April 2, 6, and 11, and 24, 1990. At the request of both parties, the record remained open until May 18th, '90 for receipt of closing arguments and for Newton Public School's exhibit 31.

Persons present for all or part of the hearing were:

Mr. and Mrs. F.	Parents of Joshua F.
Barbara Clurman	Attorney for Joshua and his parents
Alan Wyatt	Private psychologist
Laura Lees	Teacher, Willow Hill School
Natalie Sollee	Independent neuropsychologist
Philip Reddy	Special Education Administrator, Newton Public Schools
Ouida Young	Attorney for Newton Public Schools
Laura Brock	Attorney for Newton Public Schools (observing)
Jennifer King	Guidance Counselor, Brown Junior High School, Newton
Judith Malone Neville	Principal, Brown Junior High School, Newton
Judith Rothenberg	Learning Center Director, Brown Junior High School, Newton
Judith Iapoce	Learning Center teacher, Brown Junior High School, Newton
Evelyn Krieger	Reading Specialist, Brown Junior High School, Newton
Sandra Sherwood	BSEA Hearing Officer

ISSUES

1. Whether Newton Public School's (hereafter, Newton) proposed 1989-'90 IEP, calling for a 502.2 prototype placement at the Brown Jr. High School could have maximized Joshua's educational progress in the least restrictive setting; if not,

DEPT. OF EDUCATION

2. Whether Willow Hill, a private Chapter 766 approved special education day school in Sudbury, MA. provided Joshua an educational program, which maximized his educational progress in the least restrictive setting;

3. Whether the parents should be reimbursed for out of pocket expenses for therapy services provided during the 1989-'90 school year, since date of rejected IEP.

STATEMENT OF THE FACTS

1. Joshua is a 13 year old 8th grader who has attended the Newton Public Schools throughout his education until this past year, when he attended the Willow Hill School, a Ch. 766 approved day school in Sudbury, MA. Joshua is an intelligent student who evidences a history of a mild attentional deficit disorder as well as psychological problems which historically and currently interfere with his ability to learn. At the end of the seventh grade, Joshua was performing predominantly at a late seventh grade level. (Exh. P-5 at 75) Joshua presents emotionally as a very caring young man who has low self-esteem, gives up on academic tasks which he is capable of doing, and has minor behavior issues which exhibit themselves when he is avoiding tasks. Socially, he tends to isolate himself from peers. (Exh. S-2, testimony of Ms. King, Ms. Iopoce, Ms. Rothenberg, Mrs. F., Dr. Wyatt, Ms. Lees)

2. Joshua received special education services from Newton pursuant to 502.2 prototype IEP's for the 5th and 6th grades, wherein he was provided learning center support for study skills, homework, and for math, part of the time. In the sixth grade, he also received outside therapy services once a week, for he was becoming depressed, had poor self-esteem, and was more socially isolated. (Testimony of Dr. Wyatt). Newton tried to address Joshua's needs through the use of behavioral charts with a behavior therapist. (Testimony of Mrs. F.) At the end of the sixth grade, his teacher stated that great progress was not evident. He was unable to stay on task for more than a few minutes, and had difficulty being organized and turning in assignments. (Exh. P-15,at 181)

Joshua's 7th grade again included learning center support, but in the Brown Junior High School. He continued to receive outside therapy once a week with Dr. Wyatt. Joshua was hopeful that, with a new school, he would have a fresh start. He tried to handle it with no academic support, but after a month, he recognized he needed it. Such support was provided in the learning center, as well as in a more informal way, in several regular education extra help sessions in the "Y block" and before school. (Testimony of Mrs. F., Dr. Neville) Despite this help, Joshua was distractible, did not complete much of his homework.

His grades included F's in math and reading, D in modern world, B in science, B- in academic support (up from a D), and A's in metal and woodworking. (Exh. S-8)

3. In May, 1989, Newton proposed Joshua's 1989-'90 eighth grade placement, calling again for 502.2 prototype special education class 4x50 minutes/week in the learning center for academic support. (Exh. S-5) Although the parents postponed their decision pending an independent evaluation, they in fact placed Joshua in this program in September, 1989. A major part of this placement included a hand selected regular education program, determined after a joint meeting with Joshua, Mrs. F., and Dr. Neville. (Testimony of Mrs. F., Dr. Neville). After attending Newton's program for approximately three weeks, Joshua transferred to the Willow Hill School at the end of September, 1989.

The parents assert that Newton's program failed to address Joshua's educational needs in that Joshua again felt like the work was too much, and he continued to have difficulty producing homework. The parents assert that Newton failed to provide him the nurturing, small group setting where he could get the sufficiently structured, individualized approach necessary for him to succeed in his classwork and in his homework. Finally, the parents assert that Newton failed to provide Joshua with therapy services needed to make educational progress. (Testimony of Mrs. F., Parents' Closing Argument)

Newton asserts that, although Joshua had a difficult seventh grade, they anticipated a successful eighth grade year for Joshua, in that 1) Joshua is a bright boy who is capable of succeeding with the academics, given the carefully selected classes, 2) Joshua benefits from the intellectual stimulation provided in regular education classes, 3) the academic support, coordinated with the regular education classes, provides the structure needed to help Joshua succeed with the homework assigned, and 4) the father's more active involvement in Joshua's homework helped provide for Joshua's success, and finally, 5) the second year in the same school would have given Joshua the opportunity to succeed, where his first year was new and therefore more difficult. (Testimony of Ms. King, Dr. Neville)

4. At Willow Hill, Joshua is provided science, social studies, English and literature, written expression, math, and study skills in a small group (6-8 students) setting. Willow Hill also provides for social/emotional skill development through its structured socialization groups, such as morning meeting, and Project Feat. In such settings, Joshua addresses peer relations, self-responsibility, and self-esteem. (See Willow Hills' IEP, Exh. S-31, Testimony of Ms. Lees)

The parents assert that Willow Hill provides Joshua's educational needs in the least restrictive setting, in that it provides the nurturing, individualized, structured setting wherein Joshua can experience more success. (Testimony of Mr. F.,

Mrs. F.) The parents request that they be reimbursed for the 1989-'90 tuition expenses at Willow Hill as well as the therapy expenses during this period. (See Parents' Closing Argument)

Newton asserts that Willow Hill is not appropriate for Joshua, in that it lacks the intellectual stimulation so appropriate for Joshua, and that Joshua has in fact regressed behaviorally in contrast to his behavior while at Newton, and finally, to the extent that Joshua is happier, such is not attributable to Willow Hill. (Testimony of Dr. Neville, Ms. King, Ms. Rothenberg)

FINDINGS AND CONCLUSIONS

I. I find that Newton's proposed 1989-'90 IEP, with modifications set forth below, calling for a 502.2 prototype placement provided Joshua with an opportunity to maximize his educational progress in the least restrictive setting, as follows:

1. The parties are in substantial agreement as to Joshua's strengths and weaknesses, the nature of his disabilities affecting his learning, his academic skill levels, and his emotional/social difficulties. That is, both parties recognize that Joshua is a bright student who is functioning, for the most part, at grade level. (Exh. S-2, P-1, Testimony of Ms. King) Although his most current IQ test results were significantly lower than the 1987 and 1984 test results, the current evaluator noted in her report that his lack of cooperation contributed to the unreliability of such scores. (Exh. S-2, P-5) Both parties realize that Joshua has an attentional deficits, whether such is derived more from a neurological basis or from an emotional basis is disputed, but in either view, the attentional deficits are there. Both recognize that Joshua has organizational and production deficits. (Exh. S-2, P-1, Testimony of Ms. King, Dr. Sollee) Both recognize that Joshua has deficits in self-esteem and peer relations. (Testimony of Ms. King, Dr. Wyatt) Finally, both recognize Joshua's need for close monitoring in his educational setting, the need for a 1:1 setting when possible, and the need for focusing on his organizational and study skills. (See Newton's IEP, Exh. S-5, S-2, Testimony of Dr. Sollee)

The major source of disagreement between the parties is whether Joshua's needs can be addressed, while also receiving a mainstreamed education. I find they can. First, Joshua is a bright student, who benefits from the intellectual stimulation provided in mainstreamed classes; to deny him this is therefore to deny him an opportunity to maximize his educational potential. No evidence was provided which would indicate Joshua's inability to understand the material taught in his classes. (Testimony of Ms. Iapoce, Ms. Rothenberg, Dr. Neville) In fact, he is performing at grade level, for the most part. To the extent that

he has an attentional deficit, it is mild. (Testimony of Dr. Sollee) Although it requires special services, the evidence does not support Joshua's isolation from the mainstreamed education. The major factors hampering his success in the mainstreamed classes are his inability to organize his work, and his propensity for giving up. Such factors must be addressed in order to maximize his development, but there is insufficient evidence to support the assertion that these problems necessitate small group special needs classes.

First, Dr. Sollee, an independent neuropsychologist, makes no such recommendation in her report, and second, Joshua has succeeded in large mainstreamed classes and has performed poorly in a small reading class, as well as in the small group math class. (Testimony of Ms. Krieger, Ms. Lees) The only evidence supporting the need for special needs small group classes is the testimony of Dr. Wyatt and Dr. Sollee based on their after-the-fact recognition that Joshua is happier this year at Willow Hill. Such evidence was unpersuasive, however, for the witnesses provided little evidence to attribute this happiness to the small group setting at Willow Hill, but rather they talked about other factors helpful for Joshua such as a program tailored to achieve success, less homework, and more individual attention. (Testimony of Dr. Wyatt, Dr. Sollee)

2. Newton's 1989-'90 IEP, with modifications, could have addressed Joshua's educational needs, while at the same time, providing him with mainstreamed classes, appropriately stimulating for Joshua. That is, Newton provided, at least in the IEP, the study skills component focusing on organizational skills as recommended in Dr. Sollee's report. The IEP also calls for monitoring of the regular education program by the study skills teacher, again recommended in Dr. Sollee's report. Finally, Newton provided for Joshua mainstreamed classes, which were carefully selected for Joshua, given his interests and his need for teachers, who are sensitive to his attentional deficits. (Testimony of Dr. Neville)

3. Although I find that Newton can provide for Joshua's needs and in fact developed a 1989-'90 IEP which could, for the most part, address his needs, I find that it should be implemented in a way which would differ from the 7th grade services provided. Joshua requires a much higher priority in addressing his self-esteem issues through a more success oriented program. Dr. Wyatt, Dr. Solle, and in fact Ms. King, all repeatedly testified that Joshua was preoccupied with issues regarding his self-worth. They stated, as well as did Mr. F., and several of his teachers, that he would give up on tasks which he was capable of doing, but which he thought he could not do. They testified that when he in fact did well on a task, he was pleased. Joshua is not a student who is belligerent or rebellious; to the contrary, he is described as a student who wants to perform, but believes he is unable to perform things, and thereby gives up. Given this, I am convinced by Dr. Wyatt and Dr. Sollee that he requires a program which provides a much higher priority for success, than was

provided in the 7th grade.

In implementing such a priority, Newton must provide a more individualized program to assure Joshua's success. This would require a staff person to be more aware of his mainstreamed classwork and his homework, and to be able to limit/modify the homework as necessary. If such would require summaries of reading, for instance, so that he could be prepared for class without his actually doing the homework, then this could be provided Joshua. To the extent that Joshua can complete the homework better if working in a 1:1 setting with a staff member, then this should be provided. If homework can be assigned as hands on projects which are easier for Joshua, then this could be assigned. In order for this to be accomplished, the staff person assigned must have a much closer relationship with the regular education teachers in terms of knowing the assigned homework, and must also have the authority to modify the homework, as needed. The staff person must also have a closer monitoring relationship in order to know how Joshua is performing in class. This did not occur in the 7th grade and was specifically called for in Dr. Sollee's report. I note that in the 7th grade, there were lengthy periods when Ms. Iapoce did not know what Joshua's homework was, and she was not involved in modifying the homework assignments. (Testimony of Ms. Iapoce) The monitoring charts were not used throughout the year. (Testimony of Ms. Krieger) Without a close monitoring, Joshua was the kind of student who could "fall through the cracks". (Testimony of Ms. King)

An appropriate program for Joshua also requires the staff person to be able to work with Joshua in a 1:1 setting, probably throughout the year, for the teaching of study skills and for completing homework, for the evidence shows Joshua is more responsive to homework in such a setting. (Testimony of Ms. Iapoce)

Finally, an appropriate program requires the staff person to be responsible for assuring his academic success, whether it be by working with Joshua or by modifying the homework. This may require the joint work of Joshua's therapist and the staff person. The 7th grade experience where Joshua failed to produce for 80% of the time in the study skills class could only diminish Joshua's self-esteem. Although Newton may have been justified in letting Joshua fail for a certain time period in order to give him a chance to develop self-motivation, after a year of such attempt, it becomes clear that a more intensive support system is necessary. The record clearly supports Newton's ability to provide such services in a way that Joshua can succeed in the setting.

4. Given the importance in addressing Joshua's self-esteem in order that he can maximize his learning, Joshua required weekly therapy services, as provided by Dr. Wyatt. Such was specifically called for by Dr. Sollee in her report. Dr. Wyatt further stated there was a need for the therapy for the 1989-'90 school year, to address issues of self-esteem, behavior

difficulties, and other school issues. (Testimony of Dr. Wyatt, Exh. S-2, P-5) The record also suggests the appropriateness of a service similar to the Project Feat, if such is available at Newton, to addresses self-esteem in a group setting, and which could include not only regular education and special education students, but staff to build a supportive school community.

II. I find Willow Hill to be inappropriate for Joshua for the 1989-'90 school year, in that it failed to provide him with educational experiences with regular education students, which are appropriate for Joshua, as follows:

1. Neither of the evaluators relied on by the parents called for educational services necessitating a private school setting of all special needs students. Although Dr. Sollee testified that her recommendations addressed the services, not the location of such services, and that she recommends Willow Hill because of its ability to individualize for Joshua in a setting where individualization is the norm, such was unconvincing. If this were important, it would have been stated in her written report; it was not. (See Exh. S-2, P-5) The second evaluator relied on by the parents was Dr. Wyatt who testified that Joshua appeared happier, more mature, more able to address his emotional problems in therapy, and that, therefore, Willow Hill must be appropriate for Joshua. (Testimony of Dr. Wyatt) Although such testimony was considered very carefully, and it suggested that certain aspects of Willow Hill may have been constructive for Joshua, a close look at Joshua's performance there reveals that this same emotional growth could have occurred at Newton, given the modifications described above. I also note that neither evaluator had observed Willow Hill nor Joshua in that setting. (Testimony of Dr. Sollee, Dr. Wyatt)

2. The peers at Willow Hill are, for the most part, not educationally appropriate for Joshua. Many have behaviors much more severe than Josh's, or are of a significantly lower cognitive functioning. This was evident from the student profiles, (Exh. P-10), as well as in the testimony of Dr. Wyatt who expressed concerns regarding Joshua's safety with acting out peers. Although Joshua may have similar needs as some Willow Hill students in certain ways, his needs are not as severe. Although one student may be similar to Joshua in cognitive and academic levels, the student clearly has a more severe problem in school failure and in behavioral problems. I note that two of the students in Joshua's grouping were of low average intelligence and are functioning far below Joshua in academic skills, and one student of average intelligence is reading at a 2.9 grade level. Such a grouping of students is not appropriate for Joshua, given his grade level skills, his intelligence, and the relatively mild nature of his behavioral difficulties. For these reasons, Ms. King and Dr. Neville are credible in their opinions that, in the long run, it does a disservice to Joshua to stay at Willow Hill. (Testimony of Ms. King, Dr. Neville)

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3. Joshua's performance at Willow Hill supports the conclusion that the placement was not appropriate for him. His behavior deteriorated there, as compared to Newton. (Testimony of Ms. King). His need for a behavioral chart addressing yelling, blaming, physical and verbal abuse, reflects negative behaviors, not evidenced by him at Newton. (Exh. S-25, Testimony of Ms. King, Ms. Rothenberg, Dr. Neville, Ms. Iapoce) A comparision of his writing samples at the two schools evidence a change in his effort. (Exh. S-3, S-22) His therapist noted his behavior problems at Willow Hill. (Testimony of Dr. Wyatt) During an observation by Ms. Iopoce, Joshua participated very little in a history class. (Testimony of Ms. Iapoce) The Willow Hill reports repeatedly remark about Joshua's distracting other students, being disruptive and difficult. (Exh. P-2,at 50 - 54) He in fact was removed from the math class and provided a 1:1 tutor. (Testimony of Ms. Lees) This extent of avoidance behavior was not evident at Newton; although Joshua admittedly had production difficulties, he did not act out in this way. (Testimony of Ms. King, Ms. Rothernberg, Dr. Neville, Ms. Iapoce)

In addition to these examples of deteriorated behavior, there is little evidence of increased production at Willow Hill. Although Joshua completed a higher percentage of homework (Testimony of Mrs. F.), he had much less to do. In fact, he had difficulty with the production at the beginning of the year, and Willow Hill's response simply was to reduce the expected 1 1/2 hours / week of homework. (Testimony of Ms. Lees)

Although the parents assert that Joshua is happier at Willow Hill, the record supports a rather limited kind of happiness. He may have a better relationship with his parents, for less homework was expected of him, thus, less pressures existed at home. He may also have had less of a sense of failure, for there is less homework required. He may also have benefitted from the 1:1 work. (Testimony of Ms. Lees). He may therefore have been somewhat happier and have had more energy for socializing - I note with Brown Jr. High students as well as with Willow Hill students. (Testimony of Mr. F.) However, the evidence does not support the picture of a happier student in the class settings. His behavior in math class was so bad, he had to be removed. (See Willow Hill reports, Exh. P-2) To the extent that Willow Hill provided a positive experience, such could have been provided at Newton, as described above, in an appropriate, less restrictive setting.

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ORDER

Accordingly, I find that the Newton Public Schools are not responsible for the tuition and transportation to Willow Hill for the 1989-'90 school year. Newton shall reimburse Mr. and Mrs. F. for any out of pocket expenses for Joshua's therapy sessions with Dr. Wyatt during the 1989-'90 school year.

Signed Sandra Sherwood
Sandra Sherwood
Hearing Officer

Date: August 8, 1990

8/13/90

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: DIANA P. **BSEA #90-1274**

DECISION ON MOTION TO DISMISS

This ruling is rendered pursuant to Massachusetts General Laws, Chapters 71B, 30A, P.L. 94-142, and to the regulations promulgated pursuant to such statuttes.

A hearing on the above-numbered case was held on July 10th, 1990 at the Central office of the Department of Education in Quincy, MA.

Persons presnt were:

Mrs. P.	Mother of Diana P.
Carol Daynard	Special Education Administrator, Brookline Public Schools
Sara Wilson	Attorney for Brookline Public Schools
Sandra Sherwood	BSEA Hearing Officer

Mr. P., father of Diana P., and Diana P. were notifed of the hearing, but chose not to attend. (See, Mr. P.'s letter, dated July 9, 1990, Exh. C., Testimony of Mrs. P.)

MOTHER'S POSITION

Mrs. P.'s legal rights as the mother of Diana P. were denied, while Diana was a special needs student in the Brookline Public Schools (hereafter, Brookline), and the BSEA should make a finding regarding the alleged denial of rights. Accordingly, dismissing her appeal without a finding would be unjust, not only to her, but to other parents of special needs student who are divorced.

SCHOOL'S POSITION

Although Brookline may have committed procedural errors in the past, Diana has graduated; therefore, no remedy is available; the case is moot and should be dismissed.

STATEMENT OF THE FACTS

Diana is an eighteen year old young woman who attended the Brookline Public Schools, and since 1986, received special education services from Brookline, pursuant to 502.2 prototype IEP's, as well as a 502.5 prototype IEP at the Arlington School in

Belmont. (Exh. A, C, Testimony of Mrs. P.) Since 1985, Diana's parents have been divorced; Diana's father has retained physical custody since 1986, and both parents shared joint legal custody. (See, Exh. A, Family History by J. Gopen, Testimony of Mrs. P.) Diana lived in a separate apartment during the 1989-90 school year.

There were many times since 1986 throughout Diana's education, when Brookline convened Team meetings (including the June, 1989 team meeting, inviting Mr. P., and failing to invite Mrs. P.. (See, Exh. A, 11/10/87 letter, chronology) Accordingly, educational placements were decided without Mrs. P.'s input, including the Arlington School placement, and the therapy service which allowed for her involvement only if requested by Diana. Further, Brookline failed to conduct in a timely manner, a medical and sociological evaluation at Diana's home, despite Mrs. P.'s request. Brookline also failed to have the psychologist attend a team meeting. Finally, Brookline failed to put both parents' names on Diana's transcript. Diana graduated from Brookline High School in June, 1990, a graduation which Mrs. P. does not contest. Mrs. P. further is not requesting any post-graduation compensatory services for Diana. (Testimony of Mrs. P.)

Mrs. Daynard did not dispute the fact that Brookline committed procedural violations; ie, failed to notify Mrs. P. of several team meetings, and failed to conduct the medical and sociological evaluations within the required time frames. Nor did Mrs. Daynard dispute the fact that Brookline failed to include Mrs. P.'s name as parent of Diana, on the transcript. Mrs. Daynard stated, however, that staff members responsible for the violations were reprimanded or removed from the task at hand. She further stated that as of February, 1990, Brookline has instituted a system-wide policy, wherein both parents (with or without custody) of special needs students receive all notices regarding team meetings, school reports, report cards, etc. Brookline has also placed names of all custodial and noncustodial parents in the computer system, thereby assuring the proper implementation of this policy. Accordingly, Mrs. Daynard asserts that the problems encountered by Mrs. P. will not occur in the future. (Testimony of Mrs. Daynard)

RULING

Brookline's Motion to Dismiss is granted, for the case is moot. The issues which Mrs. P. has raised are issues of non-compliance which no longer present a live controversy, since Diana has graduated. Since the parties' relationship is at an end, and there is no issue of compensatory education, then non-compliance issues regarding the sociological and medical evaluation, mother's attendance at team meetings, psychologist's attendance at team meetigs, and general recognition of Mrs. P. as Diana's parent, do not present a live controversy capable of resolution by the Bureau. There is no remedy regarding the non-

compliance issues, which could impact either Diana or Mrs. P. I further note that Mrs. P.'s legal claim regarding the transcript has been rectified, and that her name is now on Diana's transcript, thus necessitating no further action. (Testimony of Mrs. P.) Finally, Mrs. P has no standing to represent the interests of other parents of special needs students, and is therefore not in a position to request a remedy which would affect other parents. Accordingly, the case is moot.

Such dismissal does not diminish the importance of Brookline's responsibility in providing for the procedural rights of special needs students and their custodial and non-custodial parents. Clearly, procedural violations can impact parents, in this case, a non-custodial party, in a way that must not be tolerated or endorsed by the BSEA or by Brookline. Brookline's continuing violations since March, 1988 are particularly troubling, given the explicit finding by the Regional Office of the Department of Education on March, 25, 1988 that Mrs. P. should be invited to team meetings. (See, Exh. A)

Sandra Sherwood
Hearing Officer

8-13-90
Date

1/14/91

RE: Rebecca B. BSEA No. 90-1678

DECISION

This decision is written pursuant to 20 U.S.C 1401 et. seq., 29 U.S.C 794, M.G.L. chs. 30A, 71B and the Regulations promulgated thereunder.

A hearing in the above-noted matter was convened on June 13, 1990 in North Andover, MA and thereafter on June 14, 28, July 13 in North Andover and August 2, and August 3, 1990 in Quincy, MA.*

The following persons were in attendance for all or part of the proceedings:

Pamela B.	Parent
Leo B.	Parent
Barbara Clurman	Attorney for Parents
Shari Stokes	Director of Special Education, Carlisle Public Schools (hereafter CPS)
Robert Fraser	Attorney, CPS
Jerry Mazor	Executive Director, CASE Collaborative
John McGuiness	Assistant Teacher, CASE Collaborative
Kathleen Lake	Certified Occupational Therapy Assistant (COTA)
Janet Higgins	Special Education Teacher, CASE Collaborative
Elaine Francis	Associate Professor, Fitchburg State College
Herman Fishbein	Executive Director, League School
Lisa Majeski	Music Therapist
Donna Mills	Behavior Consultant
James Luiselli	Psychologist
Margaret Bauman	Neurologist
Marcia Bridgeman	Occupational Therapist
Reece Erlichman	Hearing Officer

ISSUES PRESENTED

I Whether the program proposed by Carlisle for Rebecca B. (as embodied in the 1990-91 IEP) would serve to maximize her educational development in the least restrictive environment consistent with that goal?

If not, whether the League School placement would meet said standard?

II Whether Carlisle has committed procedural violations of the EAHCA and Ch. 766, such as to deny Rebecca her right to a

*Note: The record in this matter remained open for submission of written closing arguments through September 13, 1990.

free, appropriate public education?

PRELIMINARY STATEMENT [PROFILE/EDUCATIONAL HISTORY]

Profile (Refer, e.g. to testimony Mr. B., Ms. Higgins, Exhs. P-1, P-4, S-87, P-28, S-26, S-41, S-43; Parents' closing brief.)

Rebecca B. is a 13 year old multiply handicapped child, diagnosed in 1985 as having Rett Syndrome (hereafter "Rett"), a low incidence neurological disorder appearing exclusively in girls.* Becky exhibits characteristic symptoms of this disorder including loss of functional hand skills** (owing to stereotypical hand movements, banging, mouthing), loss of ambulation, absence of functional language, severe (to profound) retardation, small head size and scoliosis of the spine. Becky is non-verbal, not toilet trained and dependent for all activities of daily living. Increased muscle tone is present throughout her body, more so on the right side and in the upper extremities (particularly right shoulder and elbow). She is however cognitively alert, makes eye contact, is motivated by and responds to music, smiles or cries to express likes/dislikes, and can communicate a basic yes/no response (e.g. through head nod, turning away). Rebecca further can utilize eye gaze to make choices and uses a communication board with a two choice array of familiar pictures.

EDUCATIONAL/PROCEDURAL HISTORY

Becky has spent her entire academic career within the CASE Collaborative continuum (hereafter CASE), commencing with the pre-school program (1980-83) and continuing thereafter in ungraded substantially separate programs. For the past 4 years she has been a student in Janet Higgins' classroom. During such time parents' accepted an IEP for the period May 1989 - May 1990 (Exh. S-8, S-10). Via letter of October 1989 (Exh. P-8) parents expressed concern with Becky's schedule (Exh. P-7) arguing that as per their reading of her IEP it did not comport with the terms of same vis a vis delivery of 1:1 services. (See also Exh. S-16, acceptance of amended IEP, likewise reflecting parental concern in this regard; and see Exh. P-11, October 1989 letter revealing CASE's position on this issue and reflecting an understanding of the IEP divergent from that of parents.) Via an agreement reached through mediation on January 16, 1990, Carlisle assented to provide Beckey with daily 1:1 services in communication, perceptual motor and visual attending skills, for a total of 15

*See literature on this disorder, Exhs. P-24; S-73, 75, 76, 77, 78, 79, 81, 85, 89

**Note: No voluntary hand movements in a useful sense were observed on neurological examination (Dr. Bauman) and no voluntary reach/grasp of objects was made during Becky's most recent occupational therapy evaluation (Bridgeman), although capability of voluntary reach with right arm was demonstrated.

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sessions per week. (Exh. S-25). In February 1990, Becky's schedule was in fact amended to incorporate the additional 1:1 services sought by parents. (See Exhs. P-21 and S-29.)

The above-noted mediation agreement further provided (a) for Becky to undergo a full evaluation (occupational therapy, physical therapy, speech/language, neurological by Dr. Bauman) following which Dr. Luiselli would review same, speak with evaluators if necessary and observe Becky in her current program (for the purpose of making recommendations regarding components of a program to meet her needs); and (b) for a TEAM meeting to be held following this process. [See also release executed by parents on January 12, 1990: (1) giving Carlisle permission to have Dr. Luiselli and the Shriver Evaluation Team (including Dr. Bauman) evaluate Becky; (2) giving Dr. Luiselli permission to observe Becky in CASE and review records from 2 previous years; and (3) giving Carlisle permission to release Becky's records, if requested by Shriver or any other facility at which Dr. Bauman does evaluations. (Exh. S-22)]

Thereafter, Carlisle was notified by a February 22, 1990 letter from parents' attorney to Dr. Stokes (Exh. S-34) that parents agreed to have Becky evaluated by Dr. Bauman through Youville Hospital. The letter further stated "Following this evaluation and a meeting with the parents, Dr. Bauman will then determine whether an arena evaluation, to include occupational therapy, physical therapy, speech, and cognitive function will be required." (See also Exh. S-35, February 26, 1990 Permission to Evaluate form signed by Mr. B., which gave Carlisle permission to have Becky evaluated at Youville by Dr. Bauman and went on to say "Following this evaluation and a meeting with the parents, Dr. Bauman will then determine whether an arena evaluation will be required.")

In April 1990, the 1990-91 IEP was proposed for Becky calling for her continued placement at CASE (the program this year to be housed in Sudbury), occupational therapy (ot), physical therapy (pt), music therapy (mt)*, communication, ADL, visual and auditory attending, perceptual motor and leisure activities services, as well as consultation to staff and parents on Rett, behavioral strategies, language, and nutrition on an as needed basis. (See Exh. S-82, S-49.) This IEP was rejected by parents and is the subject of the instant appeal.

STATEMENT OF THE EVIDENCE

1. Mr. B., Rebecca's father, testified that Rebecca has attended CASE since pre-school and has basically received the same interventions for 10 years, without evidencing progress. He further stated that based upon discussions with experts, he has

*modified during the course of hearing by addition of one period weekly (totalling 3 periods weekly) and music therapy consult, see Exh. S-91

reason to believe that she has more potential than she is demonstrating. Mr. B. attested to knowledge of other Rett girls who, with intensive intervention, have made significant progress.

Based upon his March 1990 observation of Rebecca in her classroom, Mr. B presented his concerns/criticisms of the program, which may be summarized as follows: (1) arrival - Becky was left doing nothing for a long period of time while classmates were being changed; (2) feeding program - The COTA did not use hand over hand assistance, and neither placed Becky's left hand underneath the tray, nor supported her right arm (which should have been done); she further asked her to release the spoon after each spoonful which shouldn't have been done; during snack, Rebecca was fed and no hand-over hand assistance was used. [In this regard Mr. B. testified that behaviorist Donna Mills (infra) recommended a new feeding approach (backchaining) for parents to use at home with Becky, pursuant to which Becky had begun to open her mouth and move her head toward the spoon]; (3) the classroom was not distraction free (i.e., there were sounds, movement and the smell of human waste) and Rebecca performs better in a distraction free environment; (4) toileting - staff did not wash hands or clean changing area between changing students*; (5) while Becky was in the prone stander no wedge was placed under her foot, despite the fact that it should have been; moreover, during prone standing time she was read to and fell asleep despite parental request that programming be conducted while in the stander; (6) perceptual motor session - some of the tasks Becky was praised for were not volitional but rather random; positive reinforcement was not given in a timely manner (i.e. - she was praised after dropping an object); (7) recess was held in the classroom despite good weather; (8) during staff lunch period Becky was not engaged in an activity but rather slept; (9) programming ended at 2:35 vs 2:45. Additional areas of concern for Mr. B. included (a) CASE's failure to comply with parental requests for Becky's behavioral data sheets; (b) specific information regarding physical therapy techniques used in school with Becky had been requested by parents so as to insure carryover in the home, however this was not furnished; (c) in recent years CASE had not provided parent training; (d) relations between parents and CASE staff became strained during 1986 owing to various incidents (cited by way of example was discontinuation of summer physical therapy services without parental consent).

2. Mrs. B. testified regarding her interactions with Carlisle and CASE over the years, citing examples of difficulties she has encountered with the systems. By way of summary: (a) parent had provided Becky's transportation for a period of time, and on April 10, 1990 notified the LEA of her intention to discontinue the system. Becky thereafter missed 7 days of school owing to Carlisle's failure to secure transportation in a timely manner;

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*Note: the appropriateness of toileting facilities at the CASE program is the subject of a complaint filed by Mr. B. with OCR. (Exh. P-13)

(b) parents requested that they become members of the CASE parents advisory group, but this request was denied by the Collaborative despite the fact that Carlisle was not represented on that body; (c) parents requested Becky's data sheets on many occasions, but they were never furnished; instead parents were told they could meet with teacher and review the sheets, nevertheless the teacher did not provide them at the meeting; (d) protocols were drafted without parental input and parents were thereafter asked for reaction; (e) communication between parents and CASE staff this year was not substantive, see Exh. P-6; (f) great tension exists between parents and school staff; (g) the CASE administration cannot be trusted to implement Becky's IEP as written (examples were cited, e.g. - instrument furnished for music therapy was other than an omnichord as called for by the IEP). [See also Exhibit P-8, October 1989 letter from Mrs. B to Dr. Stokes outlining areas of concern vis a vis implementation of Becky's IEP and other program deficits.]

In terms of parental request that Becky's toileting program be discontinued, Mrs. B. explained that this was done after Becky's hospitalization owing to the fact that other priorities existed at that time.

3. Janet Higgins (certified teacher of severe special needs N-12, see resume Exh. S-65) has been Becky's special education classroom teacher for the past 4 years. Ms. Higgins presented testimony regarding Becky's status and progress, her educational program, and classmates who would be moving on with her to the Sudbury program for 1990-91.

The witness described Becky as a severely developmentally delayed child who, because of the severity of her cognitive disability, makes very slow gains (adding that sometimes even maintainance of skills can be viewed as progress given the nature of Rett Syndrome). With regard to progress Ms. Higgins testified that over the years Becky's visual attention has increased, that is, she has become more aware of and responsive to her environment. Becky can maintain eye contact for longer periods of time, track people and stare in order to get attention. Higgins characterized visual attending as an important skill since it is a critical foundation for development of communication, perceptual skills, etc. Insofar as eating skills are concerned, Higgins stated that Becky still requires full physical assistance with a spoon, adding that noticeable gains had not been evidenced in this area. She attributed this to the severity of Becky's physical handicap (i.e. very little functional hand movement), and thus to motoric rather than behavioral factors. Higgins did note however that while inconsistent, there has been some decrease over time in the sterotypical Rett hand movements which so interfere with Becky's programming, and further that she is using her arm, hand and

shoulder as a unit, something she did not do four years ago. In terms of ability to activate a switch (to activate tape recorder, computer, eg.) Becky only inconsistently will do so spontaneously, however she is improving in her ability to do so with verbal/physical cuing. [Thus, while Becky is now using a communication board involving a choice of two objects, she is not yet ready to use a computer as an augmentative communication device.] This witness further indicated that it would be difficult for someone unfamiliar with Becky to differentiate between a volitional and non-volitional response. [See also 1990 CASE progress reports, Exh. S-26, as well as April 1990 evaluation reports authored by Ms. Higgins, Exh. S-43, 44.]

In describing her current classroom and Becky's program therein, Higgins testified that the room is standard classroom size, populated by 7 students, utilizes dividers for 1:1 programming, houses a toileting area (which is private, segregated by dividers, and only used for 1 child at a time*), a feeding area, and a waterbed. Mainstream students come into the room during recess (and further participate in a movement/sensory class in the gym with students from Higgins' program). Staffing consists of Ms. Higgins, 2 full-time and 1 part-time aides, and a part-time occupational therapist, physical therapist and speech therapist.

Becky's program was described as predominantly 1:1 in nature, (See exhibit S-30) with behavioral data sheets kept on her performance during certain portions of the day. (See, e.g., Exh. S-64.) Higgins testified that she didn't feel it would be productive to keep data throughout every day. She furthered testified that she likes to elicit 80% performance (with cues) before having Becky move on to her next objective.) Information from data sheets is incorporated in both Becky's progress reports and her IEP.

In describing those students who would move on to the Sudbury program with Becky (see chart below for summary of student profiles as furnished by Ms. Higgins) this witness testified that they in fact represent appropriate peers for her.

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*Note: Six of the students, including Becky, are not toilet trained.

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UD.	GEND.	AGE	FEEDING	BEHAVIOR	DISABILITY	COGNITIVE LEVEL	COMMUNICATION	MOTOR	TOILETING	RELATIVE TO BECKY
2	F	9	None at School	Some crying, Self-abusive	Severe developmental delays, multiply handicapped	3-4 years	Some adapted signs; beginning to use communication board with pictures	Can crawl	Not trained	Higher functioning than Becky; good model
4	F	12	No independent skills; needs complete physical assistance	No problematic behavior	Hypotonic c.p.	Scattered 8-12 months	Non-verbal; does not sign or use communication board	4 mo. level	Not trained	Similar to Becky in level and need
5	M	11	Cannot feed independently	No problematic behavior	Hypotonic c.p.	Scattered 4-5 years	Uses augmentative communication device; non-verbal; language 4 to 5 year level	non-ambulatory	on toilet-ing schedule	Higher functioning than Becky - good model
7	F	12	Fed by G tube	No problematic behavior	Spastic c.p.	7-8 years	Uses communication board through eye gaze	No functional motor skills	Not trained	

In Higgins' opinion the IEP proposed for Becky for 1990-91 would continue to maximize her potential. It was in this witness' position that Becky need not to be educated exclusively with Rett students, as her needs and the educational techniques required to address same are consistent with those of other severely developmentally delayed students. Higgins further stated that all the recommendations contained in Dr. Bauman's report (infra) probably could be implemented within the CASE program.

When questioned regarding Donna Mills' findings this witness indicated areas of disagreement, including: (1) the CASE classroom is not, as per Mills' report, very distracting for Becky; (2) play/leisure skills are taught, consistent with Becky's level; and (3) while feeding is the only functional living skill taught, this is so owing to both Becky's level and parental request that toileting and tooth brushing be discontinued.

4. John McGuiness (June, 1990 Masters degree in severe special needs; see resume, Exh. S-68) began working with Becky in February 1990 on a 1:1 basis, one hour and 15 minutes per day, 4 times per week. Mr. McGuiness testified that Rebecca demonstrated inconsistent performance of goals, adding that reinforcers for performance included music, toys and physical contact. (See data sheets, Exh. S-64). He further testified that distraction had not been a factor in his work with her.

5. Kathleen Lake (certified occupational therapy assistant, "COTA") worked with Becky within the classroom since September 1989, focusing on feeding and fine motor skills. Ms. Lake testified that Becky's feeding skills are basically at the same level as they were in September 1989, with the exception of the fact that she now appears to be able to release the spoon when cued to do so. Similarly there has been little change over the course of the year insofar as Becky's ability to grasp objects is concerned, however she does, infrequently, show indications of shifting objects from one hand to another. As per this witness, on the day of parents' witness' (Mills) observation, Becky's arm was very tight and she winced when hand over hand assistance was used in feeding, therefore spoon feeding was utilized. (See also Exh. S-42, April 1990 ot "evaluation report" authored by Ms. Lake, indicating that Becky's attending skills increased over the year, that she exhibited good lip closure and tongue movement and displayed visual awareness to food offered. Note further that as per Dr. Stokes, Ms. Lake, as a COTA, could not and did not perform an ot evaluation per se and therefore this report should have more properly been termed a "progress report".)

6. Lisa Majeski is the music therapist who has seen Becky twice weekly since September 1989. Ms. Majeski testified that Becky demonstrates strong motivation to use music as a medium, that is, sustaining eye contact and reaching in anticipation of music and grunting in response to music. She will also at times hit the keyboard and the guitar spontaneously with an open palm. In Ms. Majeski's opinion the skills learned via music therapy could be

generalized across disciplines and music could moreover be utilized as a reinforcer for the teaching of other skills.

Majeski recommended increased music therapy for Becky (on a daily basis) in order to generate greater progress. (See also Exh. S-6, Ms. Majeski's April 1989 assessment report, recommending a minimum of two 45 minute music therapy sessions weekly as well as music therapy consultation within the classroom.)

7. Donna Mills (Masters degree in psychology, with major in applied behavior analysis; holds no certifications, see resume, Exh. P-29) has worked with a girl with Rett Syndrome for many years, has met with Becky's parents, observed her classroom in March 1990 (but did not speak to CASE staff) and reviewed her IEP and most recent progress report. (She is also the behaviorist slated for the League School Rett program.) Based thereon, Mills authored an evaluation report (Exh. P-1, S-45). While praising several aspects of the CASE program Ms. Mills cited numerous "disadvantages", which may be summarized as follows: (a) computer and prone stander time were of too long duration (as evidenced by Becky's soft crying, yawning, staring away); moreover Becky should be (but was not during the observation) engaged in a functional or pleasurable activity during standing time. (Mills acknowledged that Becky was furnished a tape recorder with switch, however she could not activate it consistently on her own); (b) the sound of other students engaged in activities appeared at times to distract Becky; (c) students varied in cognitive functioning levels; (d) teaching of independent play/leisure skills was not addressed; (e) teaching of living skills such as finger feeding, spoon feeding and toothbrushing were not emphasized; (f) systematic behavioral teaching approaches were not implemented correctly and on-going data recording did not take place throughout the day. Mills testified that based upon her experience using structured behavioral techniques with students who had fewer skills than Becky, some progress can be made.

Ms. Mills concluded that an educational program absent the above-noted components is not appropriate for Becky.

In her testimony Mills explained that she would focus Becky's program more on feeding, toothbrushing and toileting (she was not aware that parents had requested CASE to discontinue the latter.) She further criticized the behavioral objectives contained in Becky's IEP, testifying that 50% performance is not an appropriate standard for learned performance, rather 80% or better is the generally accepted standard. A child must be able to consistently perform the condition for a given period of time in order for it to be a meaningful behavioral objective.

8. Dr. James Luiselli (Ed. D., special education; licensed psychologist, experience/training in behavior management; has had previous involvement with 4 Rett students and has reviewed literature in the field; see vita, Exh. S-67) authored a February 1990 evaluation report concerning Becky (Exh. S-32). This report

was based upon direct classroom observation, teacher interview, and review of her current IEP. Dr. Luiselli thereafter participated in recommendations for a feeding program for Becky.

It was this witness' opinion that Becky was very appropriately placed in her CASE program, a program which focused properly on her multiple needs, allowed substantial opportunities for indivualized instruction and was comprehensive in scope. He expounded upon his reasons for this conclusion. Firstly, with regard to the physical status of the classroom, the changing area was private and there was no odor present. In terms of programmatic components Dr. Luiselli indicated that (1) arrival was an appropriate transition period for Becky; (2) circle was an appropriate calm, slow activity for the first period of the day during which music was utilized and staff interacted appropriately with Becky; (3) music therapy - is an important component in a treatment program for a Rett child; (4) prone stander time - a switch plate to activate a tape recorder was on Becky's tray, staff offered some initial assistance, then would periodically talk to her/give physical assistance to depress the switch, offer positive feedback; (5) communication sessions - were appropriate, teaching was effective, objects were selected based upon Becky's demonstrated preference for them, teacher allowed sufficient time for responses.

In assessing more generally the program as a whole, Dr. Luiselli noted (a) that the goals and objectives of the 1989-90 IEP were clearly specified, relevant and appropriate; (b) that therapies are well integrated into the schedule; (c) that Becky's greater than 80% individualized instruction/therapy is impressive and a major advantage to the program (as it allows for very intensive service on a regular basis); (d) her schedule was adhered to without lapses of activity, staff reflected careful organization and planning; (e) sessions were delivered in partitioned areas to eliminate potental distractions; (f) extremely efficient instruction techniques were utilized and the level of instruction was impressive.

Dr. Luiselli responded to the observations and criticisms of the program contained in Ms. Mills' report. In his opinion (a) her inference regarding duration of prone stander/computer time is speculative and not factually based; (b) partitions were arranged so as to appropriately minimize distraction; (c) the fact of students' varied cognitive functioning levels is not a feature which is properly considered a program deficit; (d) leisure skills are addressed (i.e., switch devices are used); (e) based on staff discussion, given Becky's difficulty with her shoulder and spasticity some of the functional skills which Mills advocates addressing cannot be delivered on a daily basis in an on-going manner; (f) teacher and staff used well established behavioral methods (prompting, reinforcers, pre-set response) and in general used them well. [Sequence of least to most prompting is a well established standard methodology, and the sort recommended by Johns Hopkins.] Luiselli noted that the physical limitations inherent to Rett Syndrome may limit a given student's ability to accomplish certain motor responses, and thus might

attendantly affect the types of teaching methods that should be used.

When questioned further regarding behavioral techniques and data gathering used at CASE, Dr. Luiselli testified that staff described the program as identifying skill areas from Becky's IEP objectives, and taking data to track Becky's response to set criterion during representative program times. In his view it is not necessarily required that data be recorded throughout the day, but rather sufficient to do so in representative sessions and extrapolate from them. He further testified that the forms used by CASE staff (Exh. S p.77) represent a reasonable method for data collection.

In addressing the IEP proposed for 1990-91 Dr. Luiselli testified that it is well suited to Becky's needs and reasonably calculated to maximize her educational potential. He recommended however further clarification of specific objectives (e.g conditions of instruction), further specificity as to types of cues used, and re-writing the goals so as to make them more attainable (e.g. by manipulating other factors and then raising the percentage rate). He acknowledged that 80-85% is considered a standard for measuring acquisition. Luiselli further recommended that more detailed information regarding methodlogy and data collection methods be included in the IEP and, in addition, more specificity regarding on-going behavioral consultation to the classroom.

When questioned regarding Becky's potential Dr. Luiselli testified that he could not answer with certainty, adding that given her constellation of needs it is hard to predict change within given periods of time.

9. Elaine Francis, Ed.D. (M. Ed., severe special needs; Chair Graduate Program, Fitchburg State College, See Vita Exh. S-71) testified regarding her knowledge and opinion of the CASE program (in Stow) in which Becky participated. Dr. Francis indicated that she has observed the program many times (as students from Fitchburg's severe special needs program train there). She was further hired by CASE to do an assessment of the program. (See Exhs. S-21; 27.) In Dr. Francis' opinion the program has many positive aspects including its organization, schedule, delivery of comprehensive services, excellent curriculum and staff. (See February 1990 report, Exh. S-28 for specifics.) She contrasted these positive factors with those of other less impressive programs she has seen throughout the state.

Dr. Francis further testified that she heard Ms. Mills' testimony and read her report, and disagreed with many of the observations and opinions contained therein.

In this witness' opinion the IEP proposed by Carlisle for Rebecca is, in general, thorough and comprehensive.

10. Shari Stokes, Ed. D. (certified Administrator of Special Education; see vita, Exh. S-70) is the Director of Special

Education for Carlisle Public Schools. She has furthermore read extensively in the field of Rett Syndrome and has spoken with specialists in this area.

In testifying with regard to the program proposed for Becky for 1990-91, Dr. Stokes explained that it will be located within a junior high school in Sudbury, the room size is that of a typical junior high school classroom and there are three entrances (1 to the hall, 1 to the outside, and one to an adjacent room available for individual/small group work). There is a sink in the room. Toileting can be accomplished either in bathrooms (located two doors down from the classroom) or within the classroom. Proposed staffing includes a head teacher (Ms. Corrigan, certified in severe special needs, see Exh. S-83), an assistant teacher, (Ms. Dolbashian, see Exh. S-84) and an additional assistant. Further staffing entails a licensed physical therapist, a registered occupational therapist and a music therapist. Consultants (including Dr. Luiselli, behavioral psychologist, Ms. Crowder, language pathologist and a nutritionist) will be utilized on an as needed basis. The program further offers a summer component entailing (a) summer therapies, with physical therapy continued during break periods; and (b) a daily 9:00 a.m.- 2:00 p.m. 6 week program (run by CASE, in Acton) which offers the same components as the academic year program.

Dr. Stokes indicated that other placements were considered for Becky, however CASE was proposed because all aspects of her IEP and expert recommendations could be there implemented in the least restrictive environment.

With regard to Dr. Luiselli's involvement in developing a feeding protocol for Becky, Dr. Stokes testified that at the April 1990 TEAM meeting parents expressed many concerns, among them, Becky's feeding program. Dr. Stokes therefore suggested formulating a protocol (see Exh. P-9, P-31, S-53). She thereafter secured Dr. Luiselli to do a behavioral consult on feeding which, in her view, was a first step toward development of the protocol. Dr. Stokes acknowledged that she did not specifically secure written parental consent for this. [See however January 1990 parental consent to Dr.Luiselli's initial evaluation and observation of Becky, Exh. S-22; see also Exh. S-61, May 1990 behavioral psychology consultation report authored by Dr. Luiselli (and based on (a) direct observation of Becky during a feeding session and (b) review of her status with teacher and occupational therapist), in which he ascribes Becky's self-feeding difficulties to motor impairment, and makes specific recommendations with regard to the design/objectives of a behavioral feeding program.]

11. Herman Fishbein, Executive Director, League School of Boston (Masters degree in special educaticn) is the administrator of the new Rett program (commencing summer 1990) to be housed at the League School. Mr. Fishbein testified that based upon his reading of the literature in the field as well as conversations with experts, the learning style/ needs inherent to Rett Syndrome

(e.g. extremely long time required to process a thought/accomplish a task) are different from other multi-handicapping conditions, such that it is beneficial to educate Rett girls together. He further testified that in his view Rett bears many similarities to autism.

This witness described the components of the League program in detail, indicating that it will run on a 12 month, 5 day* per week basis, and utilize a strong behavioral approach across all activities (i.e. applied behavioral analysis with data collected on targeted skills). The physical setting includes a double sized classroom (note: therapies are integrated into programming and hence are conducted within the classroom), and an additional room for more "distracting" activities (e.g. music). Students have access to a bathroom across the hall and will work on feeding skills in a separate room, it being League philosophy to education students in as close to a real world environment as possible. An observation room is also present. Program components include pt, ot, mt, st (augmentative communication), hydrotherapy, adaptive physical education/swimming, art, computers. Mainstream students from a local elementary school would visit the program twice weekly. Staffing consists of a head teacher (masters degree, severe special needs), an additional teacher (working on masters in severe special needs), an occupational therapist, physical therapist, speech therapist music therapist and a behaviorist. (See also Exh. P-25.)

When questioned regarding the student population Mr. Fishbein indicated the program would be limited to six children. He further presented a brief description of 5 students who potentially might attend the program, revealing that all were basically non-verbal, severely to profoundly retarded, ranged in age from approximately 3 years-14 years**, and presented with differing skill levels vis a vis ambulation, hand skills, behaviors and ADL skills.

EVALUATIONS

1. Margaret Bauman M.D. (pediatric neuroglist; member National Advisory Board on Rett Syndrome; has seen six Rett girls in her practice) conducted a neurological evaluation of Becky in March 1990, and reviewed her records.

Dr. Bauman testified that as Rett is a relatively newly diagnosed syndrome, there exists neither a long track record in working with these girls nor well established educational techniques for addressing their needs. However, in terms of the current state of the art, an educational program for a Rett girl

*4 days 8:50-3:00
1 day 8:50-1:00

**given the wide age span the class would basically be divided into two groups.

should incorporate the following elements: (1) a small classroom for multiply-handicapped children with providers who are experienced with multiply-handicapped (preferably Rett Syndrome); (2) consistency; (3) teachers who are flexible, i.e - will utilize given methodology and if unsuccessful modify approach; (4) emphasize separating hands, and attendantly use of hands for functional activities (through occupational therapy, behavior management techniques, music therapy, art therapy; hydrotherapy has also been useful in some cases); (5) regular physical therapy, (6) regular (preferably weekly) consultation by language pathologist to classroom teacher; (7) availability to classroom teacher of nutritional consult; (8) music/art therapy; (9) consistent consultation by behavioral psychologist to classroom; (10) 12 month program which continues therapies during summer at same level as the academic year; (11) ability to respond to medical issues.

Dr. Bauman further testified that learning is a very, very slow process for Rett children and that the pace of the disorder varies with each individual child. Some students can go through periods where they will gain skills, then regress, then re-gain them. Hence when questioned about Rebecca's potential, Dr. Bauman responded that realistically she could not quantify the degree of progress Rebecca might attain; she noted however that her neurological impairment is not such that no progress is feasible.

[See also Exh. P-4, final paragraph of Dr. Bauman's March 1990 report in which she indicates that in her opinion, an Arena Evaluation (speech and language, physical therapy, occupational therapy and possibly psychology/behavioral psychology) "...would be of doubtful significance and help in this youngster..." and"...that it would be of limited value to submit her to further assessment at this time."]

2. Cathleen Piazza, Ph. D. (Director of Behavioral Programs, Kennedy Institute, Instructor Department of Psychiatry, Johns Hopkins University) evaluated Becky in 1989 as part of a NIH grant on Rett study. Via letter of April 1990 she offered the following recommendations as to educational programming: (1) small classroom, high staff to student ratio; (2) intensive training (in order to develop any functional hand use) via one to one programming; (3) data base must be established in order to evaluate progress; (4) participation of a behavioral psychologist both to evaluate child and provide consult on behavior modification procedures; (5) music, water, other sensory items may be good reinforcers (Dr. Piazza notes however, that there are no empirical studies which demonstrate the effects of water, music or art therapies); (6) presence of a consulting speech therapist to develop a functional communication program (e.g - teaching of one or two critical signs; use of micro switches; (7) regular nutritional consults; (8) 12 month program; and (9) activities to improve attention span, on task behavior, cause and effect learning. (See Exh. P-2).

3. Rebecca was seen in June 1990 for a communication

consultation at CHMC Communication Enhancement Center by Jennifer Johnston. Ms. Johnston's recommendations included: (a) participation of a speech/language pathologist in designing Becky's communication program, facilitating implementation of same and providing guidance re: modifying/expanding; (b) use of timer, switch, tape recorder and continuous loop tapes; (c) continuned use of cause/effect software and integration of computer into Becky's program. (See Exh. P-28, and see Exh. S-4, 1988 CHMC consultation report; see also Exh. P-3, 1987 CHMC Department of Communication Disorders Evaluation report recommending that Becky's IEP include a communication component using an augmentative communication system, introducing, e.g., a communication board with a minimal number of objects.)

4. Marcia Bridgeman (registered occupational therapist, Wayland Public Schools; see Resume, Exh. S-88;) conducted an evaluation of Becky in July, 1990 (at the request of Dr. Stokes) and further reviewed portions of Becky's records. Ms. Bridgeman attested to having read literature in the field of Rett Syndrome.

Based upon her evaluation (Exh. S-87), expertise, and knowledge of Rett, Ms. Bridgeman indicated that as Rett is a relatively new diagnosis in the United States, there is limited occupational therapy research on theraputic techniques used with Rett girls, and there are no universally successful occupational therapy techniques to address Rett. There are however different approaches and theories with regard to treatment of the symptoms* associated with Rett, and her occupational therapy recommendations for Becky are culled from a cross-section of these theories. She added that they should be utilized in conjunction with other techniques as needed.

Ms. Bridgeman recommended generally that Becky's occupational therapy program continue to be geared to maintaining range of motion in upper extremities, increasing voluntary reach, developing controlled grasp and release, maintaining oral skills/good lip closure, developing self-feeding skills. She further recommended the TEAM consider implementation of a program to improve oral hypersensitivities, tongue lateralization, mature chewing and suck/swallow pattern. Ms. Bridgeman presented further detailled recommendations with regard to techniques, strategies and approaches for use in implementing the above general recommendations - among them, that the hand over hand method of feeding be scaled back, owing to: (a) lack of significant progress; and (b) Becky's apraxia, rendering it important to focus on one smaller aspect of the feeding program. She explained for example that if the focus in feeding could be limited to Becky's bringing the spoon to her mouth, then other aspects of feeding (e.g., grasp) could be addressed outside the feeding program. When questioned as to whether Becky can ever be a functional, independent eater, Ms. Bridgeman stated she

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*e.g. apraxia (inability to plan one's movements); decreased range of motion, control and functional skills; immature oral motor skills.

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could not make that prediction.

This witness indicated that all her recommendations can be implemented within the context of a public school setting.

FINDINGS AND CONCLUSION

Rebecca B. is a child with special needs, falling within the purview of 20 USC 1401 et. seq. and M.G.L. Ch. 71B. Neither her status or entitlement is in dispute. Likewise there is agreement between the parties as to the nature and severity of her needs and, to a significant extent, the constellation of services required to address same. Rebecca is uniformly described by experts as a multiply-handicapped child with Rett Syndrome, who is severely retarded, non-verbal, non-ambulatory and wholly dependent for activities of daily living. (See Profile, supra.) In accordance with consistent recommendations of educators and experts from other disciplines, Rebecca's educational needs include a small, structured, individualized program with a behavioral component, a high staff/student ratio, qualified direct service providers, and the availability of extensive one to one services, and a full range of therapies (including occupational, physical and music therapy).

The substantive issue in dispute herein is thus a limited one, relative to placement. Parents argue that Becky has not achieved effective progress under the auspices of past CASE programming. They further assert that the new Rett program (housed at the League School) would best address Becky's needs within the context of a specialized classroom designed exclusively to meet the unique needs of girls with Rett Syndrome. Carlisle asserts that the proposed CASE program would address Becky's multiple educational needs, furnish requisite therapies and hence maximize her educational development in the least restrictive environment consistent with that goal. It is my determination based upon a preponderance of the evidence presented that Carlisle's IEP, as modified by the terms of this decision (infra), is reasonably calculated to maximize Becky's educational potential in the least restrictive environment consistent with that goal, and that the League School program does not meet the dual criteria of said standard.

With regard to parents' allegations of procedural non-compliance as against Carlisle it is my determination that Carlisle has not committed procedural violations such that Becky has been denied her right to a free, appropriate public education.

My analysis follows.

ISSUE I

Close examination of the proffered CASE program reveals it to be responsive in virtually all respects to the recommendations of credible experts regarding requisite educational service delivery to Becky. As presented through documents and Carlisle

witnesses, the Sudbury program would furnish a small, substantially separate classroom for multiply handicapped students, taught by a qualified teacher (certified in severe special needs), with a high staff/student ratio (including the lead teacher, supra, an assistant teacher and an additional classroom assistant). The full compliment of necessary therapies (pt, ot, mt, as well as language therapy consult) are available to Becky through this program and these too would be delivered by credentialed providers. On the subject of therapies it should be noted that parents raised several concerns regarding what they perceived as inconsistent/inappropriate techniques utilized with Becky by her COTA (during 1989-90) particularly during the course of implementing her feeding program. As discussed supra, a comprehensive occupational therapy evaluation was in fact conducted during the pendency of this hearing (by Mr. Bridgeman), a significant portion of which addressed a feeding program for Becky. Given the recent and thorough nature of this evaluation, Ms. Bridgeman's impressive credentials, as well as her candid, credible and unrebutted testimony/recommendations, it is my determination that the strategies and recommendations which she has espoused be incorporated into Becky's IEP for implementation within the Sudbury program during 1990-91.

Another programmatic feature consistently recommended for Becky is the provision of extensive 1:1 services, in order to ensure individualized and intensive education in priority areas such as activities of daily living, communication and visual/auditory attending. As evidenced by her IEP this component too would be provided Becky within the context of the Sudbury program.

Also consistent with expert recommendation, behavioral techniques would be utilized in implementing Becky's program. However, as per both parent and school experts in the field of behavior (Dr. Luiselli, Ms. Mills), there are aspects of those behavioral objectives as outlined in Becky's IEP which require clarification and refinement in order to more completely, specifically and hence appropriately address Becky's needs. Given this unanimity of opinion between experts as to the need for amendment, and in light of the significant weight* I afford Dr. Luiselli's recommendations in this area, Carlisle is hereby ordered to modify the IEP so as to incorporate those recommendations proffered by Dr. Luiselli (concerning, e.g., conditions of instruction, attainability of goals, targeted performance and data collection methods).

The need for consultation (to CASE staff/parents) by experts in the fields of Rett, nutrition, speech/language and behavioral psychology has been acknowledged by Carlisle in its IEP. Yet, the frequency and duration of such service has been omitted.

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*Dr. Luiselli presents with extensive credentials in the field of behavioral psychology as well as first hand knowledge of Becky within her classroom environment.

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While admittedly the need for consultative services may fluctuate (e.g. more so at the outset, then, as needed) the IEP should nevertheless outline some framework for such a delivery model. (This is particularly important in the instant case given parents' allegation of Carlisle's past failure to provide language consults as called for by Becky's IEP.) Carlisle shall therefore amend the IEP so as to include greater specificity with regard to expert consultations to staff/parents in the above-enumerated areas.

In endorsing the CASE program I have not failed to consider the criticisms leveled against same by Donna Mills, the one expert testifying in this matter who specifically argued that CASE would not be appropriate to meet Becky's needs. (Refer to Mills' testimony and Exh. P-1.) There are however numerous factors which lead me not to defer to her opinion in this regard. Firstly, Ms. Mills does not hold any certification or license in her field. Secondly, many of her criticisms of the CASE program are premised on incomplete or erroneous information and assumption. (Refer to testimony Ms. Higgins, Dr. Francis, Dr. Luiselli.) Of further note is the fact that Mills never spoke to CASE staff as part of her evaluation process. And, finally, given the weight of counterveiling expert evidence on point, deference to Mills' sole opinion would simply be unjustified.

Parents have questioned the efficacy of Becky's continued placement in the CASE Collaborative system based upon their view of her ineffective progress to date under the rubric of CASE programming. The evidence however simply does not support this contention. Albeit incremental and slow, progress has in fact been effectuated in discrete areas over the years (e.g. visual attention, use of hand, arm, and shoulder as a unit, responsiveness to environment.) Furthermore, given the severity and pervasiveness of Becky's handicapping condition, as well as the fact that Rett is a relatively newly identified diagnosis, no experts have offered objective data as to the rate at which Becky can be expected to progress, nor the extent of her potential. There is thus no objective standard against which to measure the effectiveness of her progress. To infer that Becky's educational program is in some way inappropriate because there are other Rett girls who have made greater strides than she is simply to ignore too many variables and hence logic. What the record does reveal in no uncertain terms is that Becky is a child for whom, with consistent, appropriate intervention and service delivery, progress cannot be ruled out. I am convinced that such appropriate consistent service delivery is available to her through the CASE program.

I turn next to consideration of the League School program. As described through literature and Mr. Fishbein's testimony, the League's Rett program would, as does CASE, offer Becky the educational services, staffing, class size and therapies recommended by experts for her. However, it would do so (a) within the more restrictive environment of a private day program some distance from her home; (b) with an anticipated peer group

of vastly divergent ages. Absent any persuasive evidence to indicate that despite appropriate services, environment and individualized programming Rett girls can be best educated only with other Rett girls, there is no justification for endorsing the more restrictive League School program for Becky over the CASE Collaborative.

ISSUE II

Parents have raised numerous allegatgions concerning instances of procedural non-compliance as against Carlisle. Having reviewed same in their entirety I am convinced that neither considered individually nor cumulatively were they such as to have deprived Becky of her right to a free, appropriate, public education. Certain of the allegations: (1) were not timely raised in this proceeding; (2) others can be ascribed to reasonable misunderstanding/miscommunication between parties [e.g., (a) Dr. Luiselli's participation in feeding protocol-Carlisle viewed parents' initial consent to his involvement as extending to this process (Exh. S-22) while parents felt additional involvement went beyond such consent; (b) Carlisle's decision not to perform further testing subsequent to Dr.Bauman's evaluation was, in Carlisle's view, in keeping with agreement between the parties whereas parents viewed same as LEA's failure to perform complete TEAM evaluation (Exh. S-34, S-35, P-4); (c) substitution of a similar instrument for an omnichord, it being LEA's understanding that music therapist okayed such substitution. (See Exh. P-17).]; (3) others were cured during the course of the hearing (i.e., both an occupational therapy and home assessment were performed, see Exhs. S-86, S-87); (d) others were de minimis; and (e) at least one raised serious question as to Carlisle's strict compliance with the terms of Becky's IEP (i.e, issue of speech and language consultations). I caution Carlisle regarding future adherance to the specific provisions of Becky's IEP and have furthermore required that more specificity be reflected in Becky's IEP vis a vis consultative services (supra.)

ORDER

I. Carlisle shall forthwith amend Becky's IEP in accordance with the terms of this decision.

II. The procedural issues raised do not impact upon the appropriateness of the current IEP* (to maximize Rebecca's educational development in the least restrictive environment) so

*as modified

as to warrant a negative finding with regard to the proposed program, and attendantly do not warrant a favorable finding with regard to the more restrictive League School placement.

Signed Reece Erlichman

Reece Erlichman
Hearing Officer

10/4/90

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Orion B. **BSEA # 90-1703**

DECISION

This decision is rendered pursuant to M.G.L. Chapters 15, 30A and 71B; 20 U.S.C. 1401 et seq.; and all of the regulations promulgated under each of these statutes.

A hearing in the above-entitled matter was held on June 28-29 and August 1, 1990 at the Northeast Regional Education Center in North Andover, MA. The record remained open for written final arguments which were received on August 21, 1990. The Order was issued on August 30, 1990.

Those in attendance were:

Meredith H.	Parent
Orion B.	Student
Lois Carra	Psychologist
Stephen Hickey	766 Coordinator, Carroll High School
David Rosenberg	Attorney for Parent and Student
Sandra Halloran	Supervisor, Lowell Public Schools
Susan Fraser	Special Education Teacher, Lowell
Susan Floyd	Special Education Teacher, Lowell
Cheryl Hall	Social Studies Teacher, Lowell
Thomas Nuttall	Attorney for Lowell Public Schools
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Parent's Exhibits labelled P-1 through P-19; Lowell Public Schools' Exhibits labelled S-1 through S-19; and approximately 14 1/2 hours of oral testimony.

STATEMENT/HISTORY OF THE CASE

Orion B. (Orion) is a 15 year old boy who has recently completed 8th grade within the Lowell Public Schools. Orion attended kindergarten in the Bridgewater Public Schools. He attended parochial school in Lowell for grades 1 and 2 where he would have been retained in grade 2. Orion transferred to the Lowell Public Schools for his second year of 2nd grade and remained within the Lowell Public Schools (Lowell) through his 8th grade year. (See testimony, Ms. H.; P-6a-6i).

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Orion received Chapter I assistance in reading during his 3rd and 4th grade years (testimony, Ms. H.; P-9). In December 1986 during Orion's 5th grade year, Lowell developed an Individual Education Plan (IEP) to address significant spelling and handwriting problems. Under this IEP (P-7; S-16) Orion received 45 minutes per day, 3 hours 45 minutes per week, of special education services. In December 1987, Orion's 6th grade, Lowell developed an IEP covering 12/87 to 12/88 which discontinued remedial handwriting instruction but continued remedial spelling instruction for 45 minutes, 3 times per week, for a total of 2 1/4 hours per week of special education services (S-15). Both of these IEPs were accepted by Parent. Special education services were terminated at the beginning of the 1988-89 school year (Orion's 7th grade) based upon the recommendation of his special education teacher that, given Orion's many strengths, the benefit of continuing remedial spelling help did not outweigh the benefits of attendance in regular education classes at the junior high school level. Parent accepted the termination of Orion's special education services. (See testimony of Ms. H.; Ms. Floyd; P-8; S-13).

Orion spent 7th grade as a regular education student attending all regular education classes. He experienced some difficulty, receiving an overall grade of 70 (C-) in his 4 academic subjects with 2 grades in the C range and 2 grades in the D range (P-6h; S-12). During the fall of his 8th grade year Parent had Orion privately evaluated by Psychologist Lois Carra (P-1; S-11). When Parent received Dr. Carra's report, she called Lowell to arrange for a team meeting which was held on February 28, 1990. Lowell developed a 502.2 prototype IEP for Orion covering 3/90 to 3/91. This IEP provided for 45 minutes of special education services daily, 3 3/4 hours per week, to address Orion's learning difficulties. This IEP was rejected by Parent on March 28, 1990 (P-2; S-7). In late May 1990 Lowell promulgated a new 502.3 IEP which covered 9/90 to 6/91, Orion's 9th grade year at Lowell High School. This IEP provided for 90 minutes of special education services daily, 7 1/2 hours per week, to address Orion's learning difficulties (P-3; S-6). Parent does not believe this IEP is appropriate to meet Orion's needs. (See testimony, Ms. H.). Upon sending out the 9/90 to 6/91 IEP, Lowell reminded Parent that she could approve the immediate implementation of special education services provided under Lowell's proposed 3/90 to 3/91 IEP without affecting any of her rights under the appeal process (P-4). No Lowell special education services were accepted, so Orion spent his entire 8th grade year totally in regular education classes (testimony, Ms. H.; Ms. Floyd). In his 4 academic subjects for 8th grade Orion received 3 grades in the D range and one F for an overall grade of 64 (D). (See S-3; P-6i).

Parent contacted Carroll High School, a private special education day school on March 9, 1990, prior to receiving Lowell's proposed 3/90 to 3/91 IEP. Parent toured and met with Carroll High School personnel on March 22, 1990 which was prior to Parent's rejection of Lowell's 3/90 to 3/91 IEP on March 28, 1990. Parent applied to Carroll High School on April 2, 1990. Orion toured Carroll High School and attended classes there on April 6, 1990. Orion was accepted at Carroll High School on April 26, 1990. (See testimony of Ms. H.; Orion; P-2, 12a-12d, 14, 15, 16; S-7).

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Mediation was attempted in May 1990 but was unsuccessful. A pre-hearing conference was held on June 21, 1990 which clarified issues but was similarly unsuccessful in parties reaching a settlement, leading to the current appeal.

ISSUE IN DISPUTE

What proposed placement for Orion B. for the 1990-91 school year appropriately addresses his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment?

STATEMENT OF POSITIONS

Parent's Position is that Lowell's proposed 502.3 IEP for the 1990-91 school year at Lowell High School is inappropriate to address Orion's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. Parent contends that Orion requires a 502.5 private day school placement at Carroll High School in order to appropriately address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment.

Lowell's Position is that its proposed 502.3 IEP for the 1990-91 school year at Lowell High School is appropriate to address Orion's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. Lowell contends that Carroll High School is inappropriate to address Orion's special education needs; that it is too restrictive; and that it would not assure his maximum possible educational development in the least restrictive educational environment.

PROFILE OF STUDENT

Orion is a 15 year old young man of above average intelligence. On the Wechsler Intelligence Scale for Children - Revised (WISC-R) administered by Dr. Carra in November 1989, Orion received a verbal IQ of 114, a performance IQ of 115, and a full scale IQ of 117. Each of these scores place Orion within the above average range of intellectual functioning. (See P-1; S-11).

Lowell administered the Metropolitan Achievement Test (MAT) in September 1987 and in May 1988 or at the beginning and close to the end of Orion's 6th grade year. Orion received the following grade equivalent (G.E.) scores in the following subject matter areas at the following points in time on the MAT. It is noted that PHS = Post High School. (See S-14, 17):

Subject Area	Grade Equivalent Score 9/87 - 6.1 grade level	5/88 - 6.8 grade level
Vocabulary	5.4	7.9
Reading Comprehension	8.0	PHS
Math: Concepts	6.0	6.6
Math: Provlem Solving	5.3	6.4
Math: Computation	5.3	5.4
Spelling	1.8	4.4
Language	4.9	5.2
Science	10.3	PHS
Social Studies	11.8	9.0
Research Skills	8.9	8.0
Total Reading	7.2	PHS
Total Math	5.5	6.1
Total Language	3.1	4.9
Total Basic Battery	5.3	6.8
Total Complete Battery	6.2	7.8

It is noted that the Total Basic Battery = the composite of all reading, language and math scores. The Total Complete Battery = the composite of all subject areas tested. (See testimony of Ms. Halloran). It is also noted that on the 5/88 administration of the MAT, Orion's instructional reading level was found to be at a 9th - 10th grade level while his instructional math level was found to be at a 5th - 6th grade level (S-14).

Lowell administered to Orion the SRA Achievement Test in February 1990. Orion was then at an 8.6 grade level. He received the following grade equivalent scores in the following subject areas (S-19):

Subject Area	Grade Equivalent Score
Reading (Comprehension)	12.9
Language	7.7
Math	7.9
Composite Score	9.5

It is noted that both the MAT and SRA tests are group achievement tests given to all Lowell students in that specific grade at that particular point in time and are designed to measure progress or achievement over time as well as for high school placement purposes. Both the MAT and SRA tests are timed instruments administered within a regular education setting. (See testimony, Ms. Halloran).

Dr. Carra administered extensive individual testing to Orion during the fall of 1989 (P-1; S-11). In terms of academic achievement Orion, then at an 8.2 grade level achieved the following grade equivalent scores on the following test instruments:

Test Instrument	Grade Equivalent Score
Woodcock Reading Mastery Test	
Letter Identification	6.2
Word Identification	6.0
Word Attack	7.0
Word Comprehension	12.9
Passage Comprehension	11.6
Total Reading Score	8.6
Kauffman Test of Educational Achievement	
Decoding	7.5
Spelling	3.1
Math Applications	11.8
Math Computation	8.6

In the area of oral language, Dr. Carra found Orion's language production to be above average; his comprehension to be within normal limits; and his vocabulary to be superior with an age equivalent of 18 years. In the area of written language, Dr. Carra found Orion to have excellent comprehension and expression of ideas masked by poor spelling, lack of punctuation and difficulty with handwriting and maintaining a train of thought. In the areas of both verbal and visual memory, Dr. Carra found Orion to function at either age appropriate/average or above age level/high average/above average depending upon the specific instrument utilized. In the area of visuospatial functions, Dr. Carra found Orion's visual analysis to be above average and his visual synthesis to be superior but his visual motor integration and organization of complex figures was 3 - 6 years below grade level where he took a fragmented approach. In the area of attention, Orion scored within normal limits and his concentration was good when he was focused on a defined and structured task. However, he was deficit in his ability to provide his own organization and planning with unstructured tasks; in maintaining his focus and concentration on such instructional tasks; and in perceiving categories or maintaining set. Emotionally, Dr. Carra found Orion to have a good sense of self esteem and who enjoys supportive relationships with family, friends and peers although he has some concerns and discouragement regarding his problems with schoolwork. Overall, Dr. Carra found Orion to be well adjusted. (See P-1; S-11; testimony of Dr. Carra).

PARENT'S PROPOSED PROGRAM

Parent proposes that Orion be placed by Lowell at Carroll High School (CHS) for his 9th grade year. CHS is a Massachusetts Department of Education approved 502.5 private day school. Approximately 50 students will attend CHS in grades 9 through 12 for the 1990-91 school year. CHS does not generally take students for less than 2 years. The CHS campus is located in a wing of the Lincoln-Sudbury High School in Sudbury, MA. CHS admits students with average to above average intelligence who have learning disabilities. No students have primary emotional or behavioral disabilities but 20 - 30% of the CHS population have secondary self esteem or social

problems with 10 - 15% receiving counseling within CHS or privately. The Orton-Gillingham phonetic methodology is the primary approach utilized to teach decoding, encoding and language structure, supplemented by other systems such as Project Read for writing, doing reports and notebook/organizational skills.

No formal schedule at CHS has been proposed for Orion. However, if he was to attend CHS, he would receive 4 academic core courses daily - two language classes, a math class and a social studies class. The 2 language classes would be divided into a literature class emphasizing decoding, reading and written expression and a composition class emphasizing spelling, grammar, punctuation, sentence structure and paragraph structure. Math areas addressed would depend upon Orion's math level. Social studies would focus upon the structure and function of the American government and economic system, citizenship, geography and social problems. In all of Orion's academic subjects, the student to teacher ratio would range from 3-8:1. If CHS determined that Orion's language skills were too depressed, he may receive a language tutorial with a student to teacher ratio of 2:1 in lieu of one of his language classes. Students are grouped according to their skill level. Orion would also receive the following non-academic classes: Art daily because of his interest, talent and strength in this area; physical education twice per week; health 3 times per week; and keyboarding/word processing 1-2 times per week. Each student has a faculty advisor who is responsible for 5-6 students.

While no assignment of specific teachers for Orion has been made, it is proposed that the following teachers might likely be Orion's teachers: Ms. Assad for literature and composition; Ms. Lewis for math; and Mr. Hickey for social studies. All 3 are certified in moderate special needs. Ms. Atwood, the proposed art teacher, is certified in art. The health/physical education teacher has just been hired and no resume was available. Not all academic subject teachers at CHS are certified in moderate special needs. The above academic teachers potentially proposed for Orion are the only CHS teachers certified in moderate special needs except the CHS Director, Mr. Brown. Thus, if Orion receives a tutorial in lieu of one of his language classes and/or does not receive the above specified teachers for his academic subjects, those alternative teachers are not certified in moderate special needs based upon the information presented at this hearing.

(See testimony of Mr. Hickey; P-12, 13, 14, 15, 16, 17, 18, 19; S-18).

SCHOOL'S PROPOSED PROGRAM

Lowell proposes that Orion be placed at Lowell High School (LHS) under a 502.3 IEP for the 1990-91 school year. Under this IEP Orion would receive two 45 minute periods (1 1/2 hours) per day of special education classes for a total of 7 1/2 hours of special education services per week. Orion would spend the rest of his time in regular education classes. For his regular education academic classes Orion would receive daily college preparatory classes in English, pre-algebra, and physical science. Orion would also receive daily classes

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in personal typing/keyboarding and in physical education. Orion's special education classes would consist of a daily 1:1 remedial instruction tutorial and a daily small group (student to teacher ratio 2-6:1) academic support class which would meet during the final period each day.

Ms. Fraser would be Orion's special education teacher for both his 1:1 remedial instruction tutorial and his small group academic support class. Ms. Fraser has a bachelor's degree in special education/elementary education and a masters degree in moderate special needs. She is certified in Massachusetts and in New Hampshire in both moderate special needs and elementary education and has 10 years of experience in various areas of special education. She has spent the last year teaching special education students at LHS. In his 1:1 remedial instruction tutorial, Ms. Fraser would work with Orion on his written language skills, spelling skills, organizational skills and study skills. Included within the area of study and organizational skills is silent reading and content reading instruction, classification/location of main idea, topic sentences, use of key words, word clues using context, outlining/mapping techniques and various test taking and organizational skills techniques. Under spelling methods is included a linguistic/word families approach, revisualization techniques, syllabication/word attack skills, suffix/prefix rules and mnemonic devices. Included under written language is provision of correct models, remediation writing units, brainstorming, editing, sequencing and paragraph organization instruction. In Orion's small group academic support special education class, Ms. Fraser will work with Orion by pre and post teaching of regular education class materials, breaking down assignments into component steps, monitoring of and assistance with work completion and tutorial assistance with regular education work. Ms. Fraser will consult weekly with each of Orion's regular education teachers for 15 minutes to coordinate her work with those regular education teachers, to get Orion's assignments and the units he is working on in these subjects, to assess his weekly progress and to coordinate necessary modifications. Modifications to Orion's regular education program can include grades weighted in favor of verbal class participation, tape recorded class notes and/or use of buddy notes, tape recorded responses on written assignments and tests, untimed tests, taking tests in the resource room, and reptittion and restatement of directions. Ms. Fraser's schedule provides her with 45 minutes per day planning time plus 90 minutes per day for consulting and testing time. There is also computer/word processor access via Orion's IEP/Ms. Fraser because there is a word processor/computer across the hall from Ms. Fraser's room within the special education department as well as the computer lab underneath Ms. Fraser's room, and Ms. Fraser could help Orion with word processing.

(See testimony of Ms. Fraser; Ms. Halloran; S-1, 2, 5, 6; P-3).

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FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Orion B. is a student with special education needs, as defined under state and federal statutes and regulations. The fundamental issue in dispute is whether Lowell High School or Carroll High School can most appropriately address Orion's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment.

Based upon 3 days of oral testimony, the written documentation introduced into evidence, and a review of the applicable law, I conclude that Lowell's proposed 502.3 IEP for the 1990-91 school year is appropriate to address Orion's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. I further conclude that placement of Orion at Carroll High School is not required and is too restrictive a placement in which to address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment.

My analysis follows.

I.

In her summary, Dr. Carra found Orion to be a bright boy with high average reasoning and problem solving skills; very strong oral language abilities; and good ability to think flexibly and attend closely to detail. He also demonstrated a disorder of written language including reading, writing and spelling. Under Diagnostic Impression, Dr. Carra states:

> Although Orion does not have an Attention Deficit Disorder, he shows features of impaired executive functioning. These functions include attention and concentration and can affect: 1) goal formulation, 2) planning, 3) carrying out goal directed plans, 4) effective performance.

Dr. Carra's formal diagnoses pursuant to DSM III-R were:

> Specific Development Disorders: Academic Skill Disorders
> 315.10 Developmental arithmetic disorder (computation only)
> 315.80 Developmental writing and spelling disorder
> 315.00 Developmental reading disorder.

Orion is clearly a student with above average intelligence who has learning disabilities. There is some dispute regarding the extent of his learning disabilities. Parent and Lowell agree that Orion has learning disabilities in the areas of written language, spelling and organizational/executive function/study skills. Parent, through Dr. Carra, also contends that Orion has a developmental reading disorder and a developmental math disorder in the area of computation only. Lowell contends that Orion has no primary reading or computational math disorder but that the problems he experiences in these areas result from his written language, spelling and

organizational/executive function disabilities and that by addressing these disabilities, Orion's reading deficit areas and computational math will improve. (See testimony of Ms. Fraser; Ms. Floyd; Ms. Halloran).

Dr. Carra is the only professional who has individually evaluated Orion. Therefore, I give her evaluative report and written recommendations great weight. In her evaluative report dated December 4, 1989, Dr. Carra made the following overall recommendation:

> Although it is difficult to schedule time in the resource room, Orion needs direct special instruction in reading, writing and spelling. He may also need some resource room help with mathematics. As the work becomes harder, this young man who should be headed for college will need help both with his basic skills and also with organizational strategies. An education plan should be written which includes both resource room tutoring in basic skills and classroom support and modifications. Emphasis added.

Dr. Carra went on to make approximately 18 specific educational recommendations/strategies to be utilized with Orion in the areas of instructional approach in the resource room, instructional approach in the mainstream, work production/assignments in class and organization of assignments. (See P-11; S-11).

Dr. Carra's testimony at this hearing demonstrated precise understanding regarding the meaning of a resource room, resource room instruction, and classroom support/modifications within a regular education classroom in a public school setting. Indeed, Dr. Carra testified that she specializes in school problems, especially learning disabilities; that she goes to team meetings as part of her evaluations; and that she has evaluated over 600 students. Dr. Carra's evaluation and report make it abundantly clear that given the learning disabilities which she diagnosed Orion to have, which included reading and math computational skills, her prescriptive recommendations for Orion's disabilities were a resource room placement/tutoring within a public school plus modifications within the mainstream regular education setting. There is absolutely no indication whatsoever in Dr. Carra's report that any of the special education needs she found Orion to have require the restrictiveness of a 502.5 private school placement.

I find Dr. Carra's recommendations in her report that given Orion's disabilities he receive both resource room tutoring in basic skills and regular education classroom support and modifications to be credible and persuasive. As noted under **PROFILE OF STUDENT** above, Orion has many academic and social strengths. I also note the testimony of Ms. Hall, Orion's regular education social studies teacher this past year, that Orion was a "star" in her class in terms of his ability to understand and relate concepts; that he was a leader in class discussions; and that he was well liked by his peers, even being elected class wide to the position of student representative at large. Finally, I note Orion's own testimony that he likes school; that he prefers listening, talking and participating in class

discussions as opposed to writing reports and doing assignments; and that he remembers best what he hears from other people. Given Orion's many areas of strength, Dr. Carra's written recommendations would provide for remediation of Orion's learning disabilities while Orion would continue to have the opportunity to be educated and challenged within a regular public school environment.

I place great significance upon the cumulative testimony of Dr. Carra which acknowledged that the proposed Lowell IEP for Orion for the 1990-91 school year incorporates virtually all of the extensive recommendations offered in her evaluative report. Therefore, I conclude that both the type of special education services plus the type of modifications deemed necessary by Dr. Carra in her evaluation and report have been incorporated by Lowell into Orion's proposed IEP.

Based only upon the grades he has received in his academic classes, Orion has not progressed to his potential over the last several years. However, it must be remembered that Orion has been a totally regular education student for the last 2 complete school years, receiving no special education services at all. It also must be emphasized that Orion has made continued progress within Lowell based upon group standardized testing instruments. During his 6th grade year when Orion was receiving some special education services in spelling and writing, he progressed 2 - 5 years in total reading, 6 months in total math, almost 2 years in total language and approximately 1 1/2 years on both his total basic battery and total complete battery on the MAT. At the end of 6th grade Orion was functioning at a post high school level in total reading and a full year above grade level on the total complete battery which included all subtests on the MAT. On the total basic battery of the MAT - a composite of all reading, language and math scores - Orion was exactly at grade level. His total math was less than 1 year below grade level and his total language (including written language and spelling an agreed area of difficulty) was less than 2 years below grade level on the MAT. On the SRA group achievement tests administered by Lowell in February 1990 after Orion had not received any special education services for over 1 1/2 years Orion, then at an 8.6 grade level scored 3 years above grade level in reading comprehension, less than 1 year below grade level in language and math and almost 1 year above grade level, overall. (See **PROFILE OF STUDENT**, above).

Finally, Dr. Carra's individual testing of Orion when he was at an 8.2 grade level found Orion's reading - an area of disability according to Dr. Carra - to be several months above grade level at 8.6 overall, with his word comprehension and passage comprehension to be 3+ years above grade level and his decoding skills to be 1/2 year to 1 1/2 years below grade level depending upon the test instrument utilized. In math Dr. Carra found Orion's math applications to be 3 years above grade level and his math computation - an area of disability according to Dr. Carra - to be slightly above grade level. Only in spelling did Dr. Carra's testing reveal Orion to be markedly below grade level. (See **PROFILE OF STUDENT**, above).

Both state and federal special education law mandate that private or separate school placement occur only when the nature or severity of

the student's special need is such that education in a less restrictive prototype with the use of supplementary aids and services cannot be achieved satisfactorily. See 603 CMR 28:502.5; 34 CFR 300.550(b). Given Orion's overall achievement and functioning levels based upon the assessments administered by both Lowell and Dr. Carra; given Orion's many areas of academic and social strength; given Dr. Carra's prescriptive recommendations for resource room tutorial support and regular education modifications set forth in her evaluative report; and given that Lowell's proposed IEP meets virtually all of Dr. Carra's numerous recommendations; I find absolutely no basis to conclude that Orion requires the restrictiveness of a 502.5 private day school placement where he would be totally educated with other special education students for his entire school day.

II.

I conclude that Lowell's proposed IEP for Orion for the 1990-91 school year is appropriate to address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. Under this IEP Orion would receive a daily 1:1 remedial instruction tutorial to specifically address his learning disabilities plus a daily small group academic support class to provide specific support to Orion to help him with his regular education class subjects. Further, this IEP provides for consultation and coordination between Orion's special education and regular education instruction plus modifications to Orion's regular education program which will provide compensation strategies for Orion's areas of weakness. The academic support class, teacher consultation/coordination, and regular education modifications will make Orion's regular education experience more positive and productive while his deficit areas are being remediated via both the remedial instruction tutorial and the academic support class. (See **SCHOOL'S PROPOSED PROGRAM**, above; testimony of Ms. Fraser). Given that Ms. Fraser will be Orion's teacher in both his remedial instruction tutorial and academic support class as well as his liaison consulting and coordinating with his regular education teachers, she will be in a unique position to perceive Orion's day to day functioning; his generalization of the remediation and compensatory skills, strategies and techniques he learns within his special education classes into his regular education classes; and to adjust her special education instruction accordingly, as well as to inform his regular education teachers. Again, I emphasize that the proposed Lowell IEP meets virtually all of Dr. Carra's recommendations delineated in her report, according to her own testimony as well as the Lowell witnesses.

I acknowledge Dr. Carra's testimony that the proposed IEP provides no specific objectives for special education instruction in reading and math. However, despite any reading or math computational disorder, Orion tests at or above grade level in overall reading and close to grade level, at grade level or above grade level in math, even in the area of math computation. Dr. Carra's report states that Orion <u>may</u> need resource room help in math. Such math help can be provided within Orion's special education academic support class which is designed to help Orion in his regular education subjects which

includes math. More importantly, Dr. Carra herself made no specific recommendations for reading in her report. Dr. Carra and Ms. Halloran both testified that the ultimate goal of reading is reading comprehension and Orion has functioned above grade level on all tests which measure reading comprehension. Even in Orion's area of relative weakness in reading - decoding - he is only 1/2 to 1 1/2 years below grade level depending upon the instrument utilized. Further, the IEP does make numerous references to reading and reading strategies as well as word attack, syllabication, phonics and structural analysis which deal with how a word is put together and helps decoding and spelling skills. Additionally, use of a word families/linguistic approach in spelling will help reading skills. (See SCHOOL'S PROPOSED PROGRAM, above; testimony of Ms. Fraser; Ms. Halloran). Further still, reading skills help can be provided within his academic support class. Finally, the work in Orion's remedial instruction tutorial class and his academic support class which addresses his written language deficits and his organizational/study skill/executive functioning deficits - which all parties agree impact upon all aspects of Orion's educational performance - should help all areas of Orion's functioning, including reading and math.

III.

Dr. Carra's written evaluation, report and recommendations differ substantially from her testimony at this hearing. In her report Orion's learning disabilities are characterized as "somewhat subtle learning disabilities". Her testimony characterized Orion's written language and executive functioning problems as moderate to severe and his reading and math problems as moderate. Dr. Carra's report recommends special education remediation in the resource room and modifications within regular education classes. Her testimony was that Orion required a totally integrated private day school special education program in all of his subjects and that it would not serve Orion to be in any mainstreamed classes. Dr. Carra's report found Orion to have a reading and a math computation disorder but her testing also showed Orion's reading and math to be at or above grade level overall, and she made no specific reading or math recommendations for Orion. Yet her testimony criticized Lowell for not proposing specific objectives for special education instruction in reading and math.

Dr. Carra testified that she now believed Orion needed a private day school placement because she now believed that she had underestimated Orion's learning disabilities; and because of the resistence she perceived by Lowell personnel at the February 1990 TEAM meeting. Whether or not there was initial resistance by Lowell to some of Dr. Carra's recommendations, Dr. Carra has admitted that Lowell's 9/90 to 6/91 IEP incorporated virtually all of her recommendations delineated on her report. Even more significantly, Dr. Carra testified that she has not subsequently met with or evaluated Orion since November 1989 after which she prepared her report; that her tests results on Orion were valid; and that she had no knowledge of Lowell High School nor had she spoken with Ms. Fraser, Orion's proposed special education teacher, who would be responsible for the implementation and coordination of Orion's IEP. The only

basis for Dr. Carra's change of position was her subsequent review of Orion's final 8th grade report card and conversations with Parent.

I find that Dr. Carra's rationale for the change between her written recommendations in her evaluative report and her testimony at this hearing to be totally unpersuasive and without merit. I conclude that Dr. Carra's most objective evidence and recommendations regarding Orion's special education needs is her evaluative report written in December 1989 after she had extensively evaluated Orion and at a point in time removed from and prior to the initiation of the appeals process.

ORDER

1) Lowell Public Schools' proposed Individual Education Plan for Orion B. for the 1990-1991 school year is appropriate to address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment.

2) Lowell Public Schools has no financial responsibility for Parents' proposed placement of Orion at Carroll School for the 1990-1991 school year.

Raymond Oliver

Raymond Oliver, Hearing Officer

October 4, 1990

Date

42-167

2/19/91

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Tara G. **BSEA # 90-1794**

ORDER COMPELLING DISCOVERY

On January 7, 1991, Parents filed a Request for Production of Documents and Interrogatories in the above-entitled matter. The hearing in this matter is scheduled to commence on February 27, 1991. On February 15, 1991, the Hearing Officer was notified by Parents that Brookline has not produced either the requested documents nor answered the interragatories.

Therefore, Brookline is ordered to immediately produce the requested documents and answer the interragatories.

Dated: February 19, 1991

Raymond Oliver
Hearing Officer
Bureau of Special Education
Appeals

42-168

2/6/91

Michael H. and the Winchester Public Schools BSEA #90-1828

DECISION

This decision is issued pursuant to M.G.L. ch. 30A, 71B, and 15, 20 United States Code §1401 et seq. and 29 U.S.C. §794, and the regulations promulgated under those statues. A hearing was held in the above-entitled matter on October 11 and 12, and November 19, 1990, at the Public Safety Building in Winchester, MA. Those present for all or parts of the hearing were:

Mr. and Mrs. H.	Parents
Marsha Chaskelson	Neuropsychologist
Daniel Reinstein	Psychologist - Community Therapeutic Day School
Bruce Hauptman	Psychiatrist - Community Therapeutic Day School
Alan Shapiro	Educational Director - Community Therapeutic Day School
Frank Bianco	Director of Special Education - Winchester Public Schools
Cynthia Papoulias	Early Childhood Coordinator - Winchester
Sheryl Norris	Early Childhood Special Needs Teacher - Winchester
Patricia Costopulos	Speech-Language Pathologist - Winchester
Elizabeth Billings	Primary Special Needs Teacher - Winchester
Paul Lynch	School Adjustment Counselor - Winchester
Gail Colozzi	Behavioral Consultant - Winchester
Noreen Quinn-Curran	Observer
Constance Hilton	Attorney for Parents
Mary Joann Reedy	Attorney for School
Lindsay Byrne	Hearing Officer, BSEA

The official record of the hearing consists of documents submitted by the parents labeled P-1 through P-23, exhibits introduced by the school marked S-1 through S-33, and approximately 18 hours of recorded oral testimony. Both parties submitted written closing arguments by December 18, 1990, and the record closed on that date.

ISSUES

1. Whether the 1990-1991 502.4 IEP proposed by Winchester is reasonably calculated to provide the maximum feasible educational benefit to Michael in the least restrictive setting? or

2. Whether a 502.5 placement at the Community Therapeutic Day School offers Michael the least restrictive, appropriate educational program at this time?

PARENTS' POSITION

Michael is a student with complex, intertwined educational, behavioral and medical needs. He needs a highly coordinated educational program with personnel specially trained to record and address his many behavioral and learning difficulties. He has failed to make significant progress in past placements within the Winchester Public Schools, and has regressed in some areas. Winchester is offering a placement that is essentially a continuation of Michael's prior program, which failed to properly take into account the effect of Michael's seizure disorder on his learning. In addition Winchester failed to reveal its full program offering until the hearing started, more than 2 months into the school year. The Community Therapeutic Day Schools offers an educational program which meets the recommendations of all expert evaluators.

SCHOOL'S POSITION

The Primary Special Needs class at the Lynch School offers Michael intensive behavioral and pre-academic skills training in a highly-structured, small group setting, with appropriate therapeutic supported and individualized tutoring. Winchester is able to provide all recommended services and strategies within the public school setting. The Community Therapeutic Day School provides Michael with an inappropriate peer group and therapeutic focus, as well as fewer days and hours of educational service in a highly restrictive setting.

SUMMARY OF THE EVIDENCE

1. Michael is a seven year old Winchester resident, who began attending substantially separate special needs preschool programs in 1987 when he was three years old. Initial evaluations found his cognitive and language abilities to be grossly within normal limits. He did have significant behavioral immaturity and learning ideosyncrasies which merited special education intervention. (P-3; Ms. H., Papoulias)

In December, 1988, Michael was diagnosed as having a seizure disorder characterized by "modified absences." (P-9) Various medication regimes were tried with some notable behavioral progress. (P-9, Ms. H.) Michael underwent independent educational and neuropsychological testing in April, 1989. (P-7, P-18). Dr. Chaskelson, a licensed psychologist who participated in the evaluation, found most of Michael's skills to be appropriate for his age of five years. Where his performance was weak, the most significant interfering factor was his behavior and attention. Dr. Chaskelson made the following recommendations for Michael's educational programming:

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a.) a full-time, twelve month, self-contained, special education placement;
b.) individual speech/language and occupational therapies;
c.) a whole language approach in the classroom;
d.) access to a computer with auditory feedback;
e.) video programming;
f.) an individualized behavior plan with carryover and consistency in the home setting;

2. During the 1989-1990 school year, Michael attended a full day, substantially separate Kindergarten program in Winchester. (P-2, S-2). Cheryl Norris, the kindergarten teacher, described the class as a language-based program that tried to meet the individual learning needs of each student. There were one teacher and an aide, with 12 to 15 students, aged five and six years functioning between the three and six year level. At the beginning of the year Michael's pre-academic skills were at the three to five year old level, his language was significantly delayed, he had frequent behavioral issues and was unable to engage in interactive play. By the end of the year Michael was a functioning member of the group, had improved language, attended to teacher directions, chose appropriate activities, and had significantly reduced behavioral episodes. Ms. Norris testified that she never observed Michael experiencing a seizure while he was in the kindergarten. She further testified that his behavioral issues were under control by the spring of 1990, and that she recommended that his 1990-1991 educational program focus on remediation of his learning disabilities.

3. Dr. Chaskelson re-evaluated Michael in March, 1990, (P-8) as did Dr. Lombroso (P-9) and all the Winchester Public School Team members (P-6). There is a remarkable degree of consistency in their findings and recommendations. The evaluators agreed that Michael probably has average cognitive abilities, although standardized measures have yielded invalid results. He has attentional, learning and behavioral difficulties. At six years he was able to perform all pre-academic tasks on a four year level. He is unable to copy letters, numbers, and figures. He has a poor auditory memory. When he is frustrated, Michael loses control and attention. Michael's behavior showed significant improvement over the course of the year. (S-3, S-4, P-1, P-6, P-9, P-8, Norris, Ms. H., Chaskelson.)

Dr. Chaskelson reported some declines in Michael's language and cognitive functioning in the year between her evaluations. (P-8), primarily on the raw score obtained on the Peabody Picture Vocabulary Test for receptive single word vocabulary (a 95 in 1989 and 74 in 1990). Ms. Costopulos, the Winchester speech and language pathologist who has worked with Michael since 1987, disputed those findings. She pointed out that the age equivalent scores on the two PPVT administrations continued to rise (though the results were not equivalent to Michael's chronological age), thus Michael continued to acquire new skills in relation to his baseline knowledge. (Chaskelson, Costopulos). Similarly Dr.

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Hauptman, the child psychiatrist at the Community Therapeutic Day School, found the PPVT scores reported by Dr. Chaskelson to reflect a scoring drop in relation to age norms, but a consistent level of individual performance (Hauptman).

4. The various evaluators agreed that Michael needs a small, structured language-based, group learning experience with low teacher-student ratio and the opportunity for individual presentation of new material. He requires a consistent behavior management system with close coordination between home and school. He needs to be in a group of peers with similar learning needs. He should receive additional, individual speech/language and occupational therapies. (P-1, P-6, P-8, S-13, S-14, S-19, S-20, S-21, S-22, S-23, S-24, S-25, Chaskelson, Norris, Costopulos, Ms. H.)

5. Dr. Margaret Bauman, a pediatric neurologist who evaluated Michael in September, 1990 and reviewed his educational records, made similar recommendations adding that school personnel should keep a daily "seizure chart" for Michael to record the precipitants, type, duration, frequency, and after-effects of any seizures. (S-28, S-32)

6. After a Team meeting in April, 1990, Winchester offered the parents a 502.4 program at the Muraco School for Michael for the 1990-1991 school year. (P-1) The parents rejected the proposed plan on April 30, 1990. (P-1) Winchester then informally offered another self-contained program located at the Lynch School. Mr. H. and Dr. Chaskelson visited the classroom on May 16, 1990. Dr. Chaskelson testified that the class was an appropriate, language-based, learning disabilities class, but that the students in it were behaviorally higher functioning than Michael, and that the instructional level was geared to first grade language. Dr. Chaskelson believed that the Lynch class would not meet Michael's need for concrete, pre-school language instruction, consistent with his cognitive level. She was also concerned that the IEP lacked a home-school component and a mechanism for communication with medical providers. (Chaskelson) The offer of the Lynch School classroom was not reduced to an IEP until after a pre-hearing conference on July 19, 1990. (Bianco). It was not formally presented to the parents as an option until five days before the hearing began on October 11, 1990. (S-1) The parents rejected the proposed Lynch IEP orally at the hearing (Ms. H.). No evidence concerning the prior proposed placement at the Muraco School was presented at the hearing.

7. Elizabeth Billings, the special needs teacher in the Lynch School classroom proposed for Michael at the hearing described the program there. The class consists of nine students ranging in age from 6½ to 10 years. Their academic skills range from kindergarten to third grade. All require supportive, individualized instruction in order to increase their academic skills and self-esteem. Most students are mainstreamed for some

activities, and most receive some individual therapies, so there are rarely more than five students in the classroom at one time. There is an aide assigned to the classroom, though she is not currently working full-time in the class. There is a structured, behavioral system that is in place for the entire class. One student has an individual, contract-style, behavior plan. All the students have language needs which require intervention from the teacher and a speech therapist. Ms. Costopulos, the speech/language pathologist, provides services in the classroom twice a week, in addition to the individual therapies provided to each child. Ms. Billings testified that she has known of Michael since 1987, and has discussed his educational needs with Ms. Norris, his former teacher. She believes that Michael could benefit from the language models and the highly individualized instruction available in the Lynch classrooms. (Billings, Costopulos)

The proposed Lynch School IEP is identical to that offered to the parents in April, 1990, calling for Michael's placement at the Muraco School, except for the teacher designation. (Compare P-1 and S-1). Mr. Bianco, special education director for Winchester, noted that the counseling listed on the proposed Lynch IEP, as being provided by Dr. Margaret Ingram, would in fact be provided by Paul Lynch, and that Dr. Gail Colozzi would be responsible for parent support, behavioral consultation and seizure documentation.

8. In September, 1990, Michael's parents unilaterally placed him at the Community Therapeutic Day School in Lexington. The Community Therapeutic Day School is a private, ch. 766 approved, special needs day school. (P-15, 16, P-18) It serves twenty-six students, ranging in age from 3.6 years to 10.5 years, in three classrooms. Each classroom has two teacher/therapists and a student intern. There are additional staff: occupational and speech/language therapists, expressive therapists, psychologists and social workers, etc., who provide individual and classroom services as needed. The school's focus is evaluating and teaching children who present "diagnostic puzzles," primarily as a result of neurologic disorders and/or traumatic injuries or experiences. The school operates Tuesday through Friday from 9:00 a.m. to 2:00 p.m. Monday is a staff clinical day. Students are expected to participate in "mainstream" activities in their communities on Monday. The school operates a summer program during the month of July, Monday through Friday from 9:00 a.m. to 1:00 p.m. (Testimony of CTDS Educational Director, Shapiro.)

Daniel Reinstein, Michael's teacher at CTDS, described his program there. Dr. Reinstein, a psychologist, works with Michael from 9:00 a.m. to 12 noon in a group of eight students. The students range in age from 5.5 to 9.3 years old. All have behavioral issues and neurologically based learning difficulties. The group's social skills range from pre-three year old to age-appropriate. Academic skills range from Pre-Kindergarten to 2nd grade. No child, other than Michael, has a

documented seizure disorder.

According to Dr. Reinstein, the classroom provides a therapeutic milieu in which each child's individual learning needs can be addressed. A typical day for Michael would be:

9:00-9:40	Free Play. Individual OT/PT/ST might take place.
9:40-10:00	Snack
10:00-10:45	Large Group Psychotherapy - 3 teachers, 8 students.
10:45-11:30	Small Groups - drawing, movement, music, expressive therapy.
11:30-12:00	Lunch in Room
12:00-12:30	Rest
12:30-1:00	Formal Academics, small group
1:00-1:30	Twice a week - 1-1 speech therapy Twice a week - 1-1 occupational therapy
1:30-2:00	Clean-up and Good-bye ritual.

Dr. Reinstein testified that Michael did not have a formal, individual behavior plan at school. There was no evidence that a formal, seizure-recording system was in place at CTDS. Michael's academic skills remain at a pre-kindergarten level. He is using a Rebus program to improve his attention and recognition skills. He can count by rote to ten, but doesn't have number correspondence. Michael has a very short attention span and is highly distractable. His peer interactions range from impulsive poking to parallel play. Michael's behavior is generally under control, however. Dr. Reinstein has observed characteristic seizures. Dr. Reinstein testified that Michael is still in the diagnostic phase of the CTDS program and he was unable to state the particulars of Michael's potential, prognosis or plan in the CTDS program.

FINDINGS AND CONCLUSIONS

There is no dispute that Michael is a student with special learning needs as defined by M.G.L. ch. 71B and 20 U.S.C. 1401 et seq. and thus is entitled to receive a free, appropriate public education. The disagreement here centers on which of the proposed programs, the self-contained class at the Lynch School, or the Community Therapeutic Day School, can appropriately meet Michael's multiple learning needs. After careful consideration of all the evidence presented in this matter, and of the arguments of counsel for both parties, it is my determination that neither of the proposed programs adequately addresses all of Michael's complex educational needs. I find, however, that the Lynch School program can be modified to ensure that Michael receives all the recommended special education services. Since an appropriate public school placement will not exist until these modifications are in place, the parents were justified in seeking an interim placement for Michael at the Community Therapeutic Day School. My reasoning follows:

INSTITUTE OF

1. Michael's teachers, therapists, evaluators and physicians agree on the essential elements of an appropriate educational program for him. It must be a self-contained, small group classroom with a low teacher-student ratio that provides opportunities for individualized instruction and one-to-one presentation of new material. The classroom should employ a whole language approach. Michael needs to participate in individual speech and language therapy and occupational therapy. Computers, with auditory feedback, should be available for Michael. The class must be structured, with consistent behavioral expectations for all the students. In addition, Michael requires an individualized behavior plan with consistency and carryover in the home setting. School personnel should be trained to observe and record seizure activity, and must maintain close communication with Michael's physicians, as well as his parents. (P-1, P-2, P-3, P-6, P-7, P-8, P-9, P-17, P-21, S-1, S-2, S-13, S-14, S-19-25, S-28, S-32, Chaskelson, Reinstein, Hauptman, Norris, Costopulos) These recommendations (with the exception of Dr. Bauman's reports, S-28, S-32) were available to the Team planning for Michael's 1990-1991 school year.

2. Winchester, on the basis of those recommendations, drafted an IEP calling for Michael's placement in a self-contained program at the Muraco School. (P-1) In tacit acknowledgment that the proposed placement was inappropriate, Winchester produced another IEP, without a Team meeting or any parent involvement, just five days before the hearing began on October 11, 1990. (S-1) This serious violation of the parents' right to participate in the educational planning process at every juncture would alone constitute sufficient a basis to find the proposed IEP inappropriate. See: Roland M. v. Concord, ____ F.2d ____, 16 EHLR 1129 (1st Cir. Aug. 1990).

The plan, though thorough and clear in what it does address, contains substantive inadequacies. The proposed IEP lacks a discussion of Michael's seizure disorder, clearly of great concern to the parents. It lacks a plan to train Winchester staff to monitor and to record seizure activity, and to coordinate their interventions with Michael's parents and physicians. Further, it lacks a cogent presentation of Michael's individualized behavior plan, an element identified as crucial to appropriate educational programming by all evaluators. At the hearing it became clear that the classroom proposed for Michael was not in fact ready to receive him in September, 1990. The instructional aide for that classroom had additional assignments elsewhere in the building. (Bianco) The behavioral specialist did not assess the classroom until the hearing was well underway. (Colozzi) Even after the assessment, and the development of a seizure activity record, no training or recommendations geared to Michael's unique learning needs was undertaken. For these reasons, I find the 502.4 IEP as presented by Winchester at the hearing, to be procedurally and substantively inappropriate for Michael.

3. Similarly, the program in which Michael is participating at the Community Therapeutic Day School, lacks several of the elements identified as critical by various evaluators: a seizure monitoring and recording plan, an individual behavior program, and a language-based instructional environment. (Reinstein). In addition, I have serious reservations about the adequacy of the formal academic instructional time (see ¶ 8) for Michael, given Ms. Norris' observations about Michael's improved attentional and pre-academic skills and the many recommendations for longer, more intensive educational programming. Nevertheless, the evidence amply supports the conclusion that the Community Therapeutic Day School offered Michael a cohesive educational program appropriate to his complex needs at a time when Winchester did not.

4. The following modifications to the 502.4 Lynch School classroom program proposed by Winchester would address the recommendations of the various evaluators and would permit Michael to be educated in a community school environment significantly less restrictive than that available at the Community Therapeutic Day School:

1.) Training of all Michael's service providers, including the school nurse, in the observation, monitoring, intervention and recording of Michael's seizure activity;

2.) Provision for weekly consultation between school personnel and Michael's medical management team;

3.) Development of an individualized behavioral plan, based on Michael's learning style and goals, to be implemented in all settings.

4.) Training of all Michael's service providers, and his parents, in the implementation and recording of the behavioral program.

5.) Assignment of an instructional aide to the Lynch classroom, so that the teacher-student ratio does not exceed 1:5;

6.) Provision for individual speech and language therapy;

7.) Provision for individual presentation of new material.

I am persuaded that the foregoing modifications would not be unduly burdensome for the school, nor would they adversely affect the services available to the other students in the class. Further, I am persuaded that once the modifications are in place, Winchester would have the least restrictive available educational program suited to Michael's complex needs.

#2-176

The parents argued, in opposition to the proposed Winchester placement, that Michael had regressed in similar past educational programs. They relied on Dr. Chaskelson's test results as supporting that conclusion. (See P-8). I credit the testimony of Ms. Costopulos and Dr. Hauptman both, of whom explained convincingly that Michael's test results, particularly in the language area, indicate that he has maintained or improved his cognitive skills when measured against his own individual performance. Also, the parents contended that the students in Winchester were an inappropriately able peer group for Michael. Comparison of the outlines of individual learning skills presented by Dr. Reinstein and Ms. Billings, however, revealed little significant difference between the two groups aside from intensity of behavioral need. Indeed, the student group in Ms. Billings class would offer Michael more models of age appropriate language and behavior than would the group at Community Therapeutic Day School, as recommended by Dr. Chaskelson.

I am persuaded, based on the preponderance of the credible evidence that with the modifications set out above, Winchester can offer an educational program reasonably calculated to provide the maximum feasible educational benefit to Michael, in the least restrictive setting.

ORDER

Winchester shall hold a Team meeting within 20 days of the date of this decision to develop an educational plan containing the modifications listed at ¶ 4 above and otherwise consistent with this decision, and shall notify the hearing officer of its compliance with this order. Until such time that an appropriate IEP is developed and offered to the parents, the parents shall be entitled to reimbursement for Michael's special education program at the Community Therapeutic Day School.

Signed: Lindsay Byrne (LHH)
Lindsay Byrne
Hearing Officer
Bureau of Special Education Appeals

Date: February 6, 1991

41-177

3/29/91

In re: Omar O. **BSEA #91-0059**

DECISION

This decison is rendered pursuant to Massachusetts General Laws, Ch. 71B, 30A, 20 U.S.C.1401 et seq. and to the regulations promulgated pursuant to such statutues.

A hearing on the above-numbered case was held at the Worcester South Community High School on November 15, 16, December 17, 18, 1990. The record remained open until January 18, 1991, for receipt of closing arguments.

Persons present for all or part of the hearing were:

Mr. and Mrs. O.	Parents of Omar O.
Omar O.	Student
Pamela Gray	Attorney for Omar and his parents
Terrell Clark	Psychologist, Childrens Hospital Medical Center
Nancy Frazer	Supervising Teacher, The Learning Center
Marie Philip	Bilingual/Bicultural Coordinator, The Learning Center
Michael Bello	Educational Coordinator, The Learning Center
David Geeslin	Intern, Boston Childrens' Hospital Deaf Network
Jackie Woodside	Director of the Deaf Services, Worcester Deaf Center
Karin Dunbar	Case Manager, Massachusetts Commission for the Deaf and Hard of Hearing
James Underwood	Special Education Administrator, Worcester Public Schools
Mary Joann Reedy	Attorney for Worcester Public Schools
Robert O'Donnell	Law Clerk for Mary Joann Reedy
Maryann Mastroberti	Team evaluation Chairperson, Worcester Public Schools
Gail Raney	Teacher of the Deaf
Marjorie Wetzl	Teacher of the Deaf
Ruth Annis	Interpreter/Tutor, Worcester Public Schools
Kathy Russo	Teacher of the Deaf/Speech-Lanugage Therapist, Worcester Public Schools
Kelly Mills	Interpreter
Bonnie Kraft	Interpreter
Laurie Meyer	Interpreter
Laurie Rothfeld	Interpreter,
Tupper Dunbar	Interpreter
Carol Seidman	Interpreter
Sandra Sherwood	BSEA Hearing Officer

ISSUES

I. Whether Worcester Public School's (hereafter, Worcester) proposed 1990 - 1991 IEP for Omar O. calling for a 502.4 placement at the Worcester South High School maximizes Omar's educational development in the least restrictive setting; if not,

II. Whether the Learning Center, a Chapter 766 approved private school located in the Framingham North High School, can maximize Omar's educational development in the least restrictive setting.

PARENTS' POSITION

Omar is not able to maximize his educational potential in the Worcester High School, primarily because the method of communication is Pidgin Signed English (hereafter, PSE) rather than American Sign Language (hereinafter, ASL). Furthermore, the program relies on the use of interpreters who cannot convey all of the information, thus inhibiting Omar's acquisition of information. The program also fails to provide a sufficient group of appropriate peers with whom he can communicate, thus rendering the program too restrictive for Omar. The parents assert that the Learning Center, a school for the deaf, is the appropriate program in the least restrictive setting. It teaches all academics, including English, in ASL. It provides a selection of appropriate peers, who can communicate with Omar. All teaching is provided by signers, thus rendering interpreters unnecessary for the classroom.

SCHOOL'S POSITION

Worcester South High School provides Omar with an appropriate program in the least restrictive setting. The deaf resource class is taught by well qualified staff in a setting with appropriate peers. In addition, Omar is successfully mainstreamed, he achieves good grades, and he is achieving at his potential. Omar is able to learn in the mainstreamed classes with the use of a highly competent interpreter. PSE is the appropriate language for Omar, for he is stronger in this language. Furthermore, Worcester's program can provide the ASL method of communication.

STATEMENT OF THE FACTS

1. Omar is a sixteen year old junior high school student of average intelligence* who has a profound bilateral sensori-neural loss, evident since infancy. His academic skills are approximately at the 4th - 5th grade level in reading, and 6th - 7th grade in math with a wider scatter of math skills. He has difficulties with ideomatic language and inferential questions. (Student Exh. 1, School exhibits 20, 21, 45, Dr. Clark, Ms. Wetzell, Ms. Raney) Omar's primary method of communication is signing; the parties dispute whether he uses primarily PSE or ASL. Omar has a strong self-image and is a motivated student who desires to go to Gallaudet University upon high school graduation. (Testimony of Omar, Ms. Wetzl, Ms. Woodside, Student exh. 1)

2. Omar has attended the Worcester High School's program since 1988. In the proposed program, where he is currently attending, Omar attends the resource room for the deaf and hard of hearing for reading, history and English. The class is taught by two teachers of the deaf; the curriculum provided is one which is paralleled to the mainstream curriculum, but adapted to the needs and skill levels of the students. The class also provides activities and speakers addressing deaf culture and history. There are nine other students in this class. Omar is also mainstreamed for math, government and the law, gym, and business computer. He is provided an interpreter in these classes. Finally, Omar is provided speech services and also has available to him after school activities, if he so desires. (Testimony of Ms. Raney, Ms. Wetzl)

Omar asserts that he is not able to learn to his maximum ability in this program; he stated that he is not able to understand the school signers as well as ASL signers, that he feels isolated from his deaf peer who are less motivated to attend college, and from his hearing peers with whom he has great difficulty communicating. He also asserts that he feels that he cannot fully understand the government and law class material because he depends on an interpreter. (Testimony of Omar O.)

Worcester asserts that its proposed program maximizes Omar's educational development in the least restrictive setting in that the resource room provides him an excellent program taught by well-qualified and enthusiastic teachers, and the program uses PSE signing as appropriate for Omar, and can include more ASL, if so ordered. Worcester also asserts that Omar enjoys his mainstreamed classes and receives acceptable, if not excellent, grades. Finally, Worcester asserts that Omar's solid self-confidence allows him to benefit from mainstreamed settings, something necessary for his success in the hearing world. (Testimony of Ms. Raney, Ms. Wetzl)

* Although there were several IQ test scores reflecting discrepencies, Dr. Clark opined that Omar is of solidly average intelligence; this was not disputed by Worcester.

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3. Omar and his parents assert that the Learning Center can provide the appropriate program for Omar. At the Learning Center, Omar would be in the High School program, which is currently located in Framingham High School, although it will be relocated in the fall at the campus of the Learning Center. The Learning Center High School currently has enrolled 28 students who are all deaf or hard of hearing. The majority of these students - approximately 18 - intend to go to college, such as Gallaudet upon their graduation. The program offers an array of high school level courses, all taught by a teacher of the deaf without the use of an interpreter. The program, in addition, offers ASL and Deaf Culture courses. Finally, English is taught as a second language. The classes have approximately 3-5 students with the exception of the social studies classes, which have larger groupings -- 8-9 -- in order to provide the richer discussions which come with larger groups. For this school year, students can, if deemed appropriate, attend mainstreamed classes and/or function within the Framingham High School, and an interpreter would be provided. The staff are selected in part on their attitude towards deafness, ie., that deaf persons are a linguistic minority, rather than a handicapped population. The philosophy of the school has since 1988 undergone a transition from a total communication to an ASL philosophy, wherein ASL, to the extent possible, is the language used. Thus, PSE and lipreading are used only to the extent that a student requires it in a 1:1 setting. Finally, The Learning Center offers an array of extracurricular activites and functions, such as sports, trips to learn about deaf culture, etc. (Testimony of Mr. Bello, Ms. Frazer, Ms. Philip)

4. Worcester asserts that the Learning Center has a program, which is in fact very similar to its own program, ie., the staff and students have varying degrees of ASL signing abilities, the curriculum is in transition from a total communication to an ASL curriculum, and both offer programs on deaf culture. Finally, it asserts that Worcester is, by virtue its prototype, less restrictive and therefore offers more mainstreaming opportunities for Omar. (See School's closing brief) Although the Learning Center program is currently in a public high school and offers mainstreaming experiences, it is in fact a private school and may not remain in the public high school. (Testimony of Mr. Bellow)

FINDINGS AND CONCLUSIONS

I. I find that the 1990 - 1991 IEP calling for Omar's placement in the Worcester South High School fails to maximize Omar's educational development in the least restrictive setting, as follows:

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IN PRELIMINARY

1. The parties are in substantial agreement as to many of Omar's strengths and weaknesses, his skill levels, and his disability. That is, he is of average intelligence, is profoundly deaf, is a motivated student who intends to go to college, preferably Gallaudet University, communicates primarily through signing, and functions at the 4th - 5th grade level in reading, and a higher level in math. (Testimony of Dr. Clark, Ms. Raney, Ms. Wetzel, Ms. Russo) There are, however, several disagreements regarding Omar's educational needs, which have led to the controversy regarding the appropriate educational placement for Omar. That is, the parties dispute Omar's primary method of communication, ie., PSE or ASL; they dispute Omar's ability to benefit from mainstreaming experiences; and they dispute the need for the teaching of English as a second language.

2. The parents were persuasive in their assertion that Omar's primary method of communication is ASL. After considering the testimony of many witnesses in regards to this issue, it became clear that Omar's more natural language is ASL, that he can more quickly and accurately understand in this language. His expressive ability is more limited, but this is because of his lesser exposure to the vocabulary used in ASL and to the fact that he has been taught PSE, rather than ASL in school. In the Childrens' Hospital evaluation, the Speech/Language evaluator reported that his comprehension of stories was better in ASL than in PSE, and that expressively his communication through PSE is much less clear than his more ASL-like expressive language. (Student Exh. 1) It is also clear that to the extent he has difficulty understanding in ASL, it is due to the more higher level vocabulary associated with higher level learning. This description of his signing ability in fact correlates to the testimony not only of Dr. Clark and Mr. Geeslin, who worked with the Childrens' Hospital speech/language evaluator, but also with his teachers, Ms. Raney and Ms. Wetzl. That is, they both in fact recognized that the reason why their opinions regarding Omar's signing abilities differed from those in Omar's previous IEPs, was that his current course load called for higher level vocabulary and concepts, which Omar had not mastered in ASL, thus requiring the use of PSE. (Testimony of Ms. Wetzl, Ms. Raney, Ms. Annis) Clearly, the Childrens' Hospital is persuasive in its position that all content courses should be taught in ASL in order that his development of vocabulary and concepts can be maximized.

3. Worcester was unpersuasive in its assertion that Omar's primary language is PSE. Its most telling evidence is that the tutor, who interprets for Omar in the law and government class, uses ASL in order to communicate with Omar, except when he does not understand certain vocabulary; then she uses PSE. (Testimony of Ms. Annis) Furthermore, as stated above, several of Omar's previous IEP's stated very explicitly that ASL was his more comfortable language (School Exh. 8, 9). Finally, Worcester provided no formal testing, which would rebut the Childrens' Hospital testing and its own IEP's regarding his primary language. Worcester's strongest evidence supporting its

IN PRELIMINARY EDITION

assertion was the testimony of its teachers, yet they recognized that the reason Omar was not more comfortable with ASL was his lack of familiarity with higher level vocabulary and concepts in ASL, and that with more basic communication, he prefers ASL. (Testimony of Ms. Raney, Ms. Wetzl) This testimony does not negate the fact that ASL should be his primary language, but instead supports the Childrens' Hospital conclusion that he needs to be taught the higher level vocabulary and concepts in ASL. Worcester also offered testimony that Omar could not understand a particular ASL signing visitor. Although this was puzzling, it was an isolated event, and was insufficient to rebut the extensive evidence from Childrens' Hospital, its own IEP's, its use of an ASL interpreter for Omar's mainstreamed classes, and lastly, its own teachers' explanation that Omar's limitations in ASL were due to his lack of familiarity with higher level vocabulary and concepts in ASL. Accordingly, the Childrens' Hospital recommendations are given full credence, ie, that Omar should be provided an educational program which teaches all subjects in ASL and teaches English as a Second Language. (Student Exh. 1, 2)

4. The parents were persuasive in their assertion that Omar's benefit from mainstreamed academics is limited, and is better served in classes taught by teachers of the deaf. Although mainstreamed experiences in classes where verbal communication is very limited may have some benefit to Omar, such as nonacademics and business computers, his pressing need for developing his language skills outweighs this benefit. This is particularly true given his strong desire to attend Gallaudet University, and therefore, his need to increase his language skills intensely prior to graduation, in order to meet the entrance requirements. (Testimony of Dr. Clark) It is additionally important, given his relatively poor English skills necessary to communicate with the hearing world. (Testimony of Dr. Clark) Further, the mainstreamed classes which do include a lot of language, such as government and the law, and math, do not provide him with the intensive language or substantive information through teaching methods appropriate for Omar. Dr. Clark was persuasive that such mainstreamed classes are inappropriate for Omar, in that he needs classes, where he is taught at the speed appropriate for him, is taught the needed vocabulary, is taught through a more multi sensory approach used by teachers of the deaf, and is taught with other students requiring similar teaching methods. Furthermore, Omar's ability to participate in class discussion is severely limited, partly because he has difficulty keeping up with the conversation, and partly because the interpreter is not able to interpret the students' conversations. Only in a setting designed for a deaf student can Omar develop the language and content at his maximum rate. (Testimony of Dr. Clark) Although Worcester may be correct that the law and government class is an exciting one, which Omar wanted to take, and although they may be correct that the interpreter is doing an excellent job in conveying the information, still, the class is not geared to his needs, and therefore fails to maximize his development. Given his desire to attend Gallaudet University, as well as the legal mandate to

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provide the opportunity to maximize his potential, Omar should be given every opportunity to develop his skills prior to graduation. This cannot be done for Omar in a mainstreamed academic setting. It goes without saying, however, that Worcester's obligation is limited to providing this opportunity to develop his potential; whether Omar actually can achieve the admission to Gallaudet University, remains to be seen, and is not a required goal for Worcester.

5. The parents were persuasive in their assertion that Omar should be taught English as a Second Language. First, both parties recognize the importance of Omar's developing his English skills - both in reading and in language arts. Such is needed in order to communicate with the hearing world, to read and write, and to obtain admission to Gallaudet University. Thus, the program which maximizes his development in this area is critical. Second, since Omar receives information more easily in ASL, his ability to learn English in his more native language is enhanced. (Testimony of Dr. Clark) Although Worcester asserts that Omar will more readily learn English by using the English language, thus justifying the use of PSE, such assertion was not persuasive. Certainly, English must be practiced. However, the record shows that Omar's acquisition of English, as it has been taught, has been slow. The record also shows that much of Omar's learning in English is the acquisition of rules. Certainly explaining rules in the native language would make easier and faster learning for Omar. Given his ability to more easily learn new information through ASL, Dr. Clark's opinion appears reasonable that ASL should be used to teach him the new information necessary to have a better use of the English language.

6. The Worcester program fails to provide Omar with a progam, which uses ASL as the predominant method of communication, as needed for Omar. First, the program has only two teachers of the deaf, and only one of them is a skilled ASL signer. The second teacher, who teaches reading and U.S. history, is basically a PSE signer, although she has taken a course in ASL. (Testimony of Ms. Wetzl) Secondly, even if both teachers were skilled ASL signers, a review of the IEP's of the Worcester students evidences that they are not predominantly ASL signers: five of the nine students voice and sign, thus necessitating PSE; one is a PSE signer; one uses voice and signs, but has stronger ASL receptive skills; and only two students are predominantly ASL signers. (Student Exh. 14) Thus, with this student body, teaching with PSE and voicing addresses the needs of the majority of the students, and in fact, the testimony reveals that PSE is indeed the method of communication used by the teachers while teaching. (Testimony of Ms. Wetzl, Ms. Raney) Although there may be a blending of the PSE and ASL signing, the evidence supports the conclusion that, on the whole, the signing is - and should be, given the student population - much closer to PSE.

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7. The Worcester program fails to provide Omar with a program which offers an array of content courses taught by teachers of the deaf, where the students are sufficient in number and in skill levels necessary to offer the stimulation appropriate for Omar, given his intelligence, motivation to learn, his interests, and his desire to attend Gallaudet University. In fact, the teachers recommended against placing Omar in all resource room classes specifically because he would be denied the more stimulating classes, taught by staff specializing in the content area classes. (Testimony of Ms. Raney, Wetzl) If Omar were to go in the resource room, the possible classes would be limited, for the only teachers are Ms. Raney and Ms. Wetzl. Further, the students would be limited to the nine students currently with Omar. Given the fact that only a few of them are similar to Omar in their educational interests, the evidence was unpersuasive that such a peer grouping could provide Omar with the intellectual stimulation appropriate for him. (Student Exh. 14)

8. Worcester's program fails to provide Omar with the English as a Second Language class necessary for Omar to maximize his development of the English language. Even if Worcester were to add such a class to its curriculum, it is not currently in place. Given the fact that Omar has limited time prior to his graduation and his need to develop his language skills at as fast a pace as is possible, waiting for Worcester to provide such a class would not be in line with the mandate to maximize his educational development.

9. Although Worcester provides Omar with opportunities for mainstreaming with regular education students - opportunities which may be beneficial in the sense that Omar must prepare himself for interactions with the hearing world and in the sense that Omar's strong self-esteem allows him to handle the situations, it is an opportunity which, when compared to his need for developing at a very fast pace his language skills necessary for entering Gallaudet University, is of a lesser importance for him. Accordingly, the mainstreaming opportunities do not change the fact that Worcester's program cannot maximize Omar's opportunities for educational development.

II. The Learning Center maximizes Omar's opportunity for educational development in the least restrictive setting, as follows:

1. The Learning Center provides a full curriculum geared towards teaching in ASL. First, the staff, as a whole, are proficient ASL signers. Of the six teachers who would most probably teacher Omar, four are very good - excellent ASL signers and two sign ASL but are not as fluent. (Testimony of Ms. Philips) When these facts are compared to the Worcester program, it is clear that the Learning Center program, as a whole, offers a much more ASL oriented staff than does Worcester. Of the two Worcester staff who sign, one signs ASL well, the other does not. Although Worcester's interpreter signs ASL very well, she is not a teacher, and for purposes of analyzing the abilities of the teachers to

teach in the ASL language, the teachers` skills alone are considered. This does not mention the fact that none of the mainstreamed teachers sign ASL.

2. The Learning Center offers peers for Omar who, as a group, are to a much greater degree than at Worcester, ASL signers, and have similar skills to Omar. That is, eight of the students have 4th - 5th grade reading skills. (Testimony of Ms. Frazer) Twenty of the twenty-eight students are primarily ASL signers. Nine of the twelve students, who would be grouped with Omar, intend to go to college. Over half of the twenty-eight students in the program are college bound. (Testimony of Ms. Frazer)

3. The curriculum is, on the whole, an ASL curriculum. First, the classes are, for the most part, taught with signing and no voice, allowing, therefore, for maximum use of ASL signing. (Testimony of Dr. Clark, Mr. Bellow) Only in a 1:1 setting where an individual student voices, is voicing used by the teacher. (Testimony of Ms. Frazer) I note that this testimony was in conflict with Ms. Russo's observation of signing and voicing in class. It however, supports the view that the overall orientation is towards ASL, even if on occasion, PSE and voicing is used. Second, given the balance of teachers and students towards ASL as their primary method of communication, it is natural that the program, as a whole, is an ASL oriented program. Third, the curriculum specifically includes ESL, wherein English is taught in the ASL language - again, a natural outcome of the makeup of teachers and students, who lean towards ASL as their primary method of communication. Although it is admitted that the Learning Center is not a purely ASL setting, that it is still in transition from the total communication program, the balance comes much closer to providing the ASL environment than that of Worcester, and therefore is the appropriate program for Omar.

The Learning Center also provides an array of content courses, ie, earth science, biology, world geography, world history, U.S. History, American Government, deaf studies, etc., all taught in ASL, all taught with a sufficiently large group of deaf students, so as to provide the stimulating discussions appropriate for a junior in high school.

ORDER

Worcester Public Schools shall develop a 502.5 prototype IEP placing Omar at the Learning Center for the remainder of the 1990 - 1991 school year.

_____ _____

Sandra Sherwood, Hearing Officer
Bureau of Special Education Appeals

Date

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Kevin H. **BSEA # 91-0069**

DECISION

This decision is rendered pursuant to M.G.L. Chapters 15, 30A and 71B; 20 U.S.C. 1401 et seq.; and all of the regulations promulgated under each of these statutes.

A hearing in the above-entitled matter was held on September 26-27, October 11, and October 16, 1990 at the Woburn Public Schools Administration Building in Woburn, MA. The record remained open for final exhibits and written final arguments until October 29, 1990.

Those in attendance were:

Ronald H.	Father
Patricia H.	Mother
Michael Talbot	Headmaster, Krebs-Cotting School
Anne Cady	Special Education Coordinator, Krebs-Cotting School
Lorelle Lawlor	Special Education Teacher, Krebs-Cotting
Mark Sarkisian	School Psychologist, Krebs-Cotting
Marie Dacey	School Psychologist/Parents' Evaluator
Sara Berman	Attorney for Parents and Student
Robert McArdle	Administrator of Special Education, Woburn Public Schools
James Sheeran	Team Chairperson/Liaison, Woburn
Joyce Gatta	Special Education Teacher, Woburn
Thomas Nuttall	Attorney for Woburn Public Schools
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of a set of Exhibits introduced by the School but utilized and added to by both parties. These exhibits are labelled S-1 through S-26.

STATEMENT/HISTORY OF THE CASE

Kevin H. (Kevin) is a 17 year old young man who currently is attending the Krebs-Cotting School, a private day school, in Lexington, MA.

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Kevin began his educational career in parochial school but transferred to the Woburn Public Schools (Woburn) during 1st grade. He repeated 1st grade in Woburn. His family moved to New Hampshire for Kevin's 2nd grade year but returned to Woburn for his 3rd grade year. Kevin was evaluated at Lahey Clinic in 1982 which found him to have an attention deficit disorder (ADD). Kevin was evaluated by Woburn during his 3rd grade year and an Individual Education Plan (IEP) was developed providing him with resource room services. Kevin remained within Woburn for grades 4 through 6 under various IEPs including a short period within a substantially separate classroom. He was unsuccessful to the extent that Parents took him out of school for approximately the last month of these 3 school years with Woburn's permission. Kevin was again evaluated at Leahy Clinic in 1986. Parents discovered Krebs School and after an agreed upon 8 week diagnostic placement at Krebs during the fall of Kevin's 7th grade year (1986) Woburn agreed to continue Kevin's placement. Kevin has remained at Krebs (now the Krebs-Cotting School since a merger of Krebs School and Cotting School) for his full 7th, 8th, 9th, and 10th grade years and continues there in the 11th grade up to the present time. (See testimony of Mr. H.; Mr. Sheeran; S-26).

In the spring of 1988 Woburn conducted a 3 year evaluation of Kevin with Woburn and Krebs-Cotting personnel conducting those assessments (S-13, 14, 15, 16, 20). When Woburn promulgated its 1988-89 IEP for Kevin (S-13) for his 3rd year at Krebs-Cotting School (KCS) it was noted under Additional Information:

> Transitioning from private to public school will be further discussed during the 1988-89 academic year.

Kevin's 1989-90 IEP (S-9) which continued Kevin at KCS for his 4th year noted under Additional Information:

> Transitioning: Starting Term III - Kevin will attend Woburn High School for 2 periods per day. This daily mainstreaming will be monitored and, if deemed appropriate, transitioning will be gradually increased for the remainder of the 1989-90 academic year. This will be addressed by TEAM meetings and Amendments written into the current Individual Education Plan. It is anticipated that Kevin will be fully transitioned back to the Woburn School System in September 1990.

Parents accepted this IEP except for the above transitioning component which was rejected. Kevin remained at KCS for the entire 1989-90 school year.

In the spring of 1990 Woburn developed its 1990-91 IEP for Kevin proposing a 502.2 placement at Woburn High School beginning in September 1990 (S-2). Under Additional Information it was provided:

> During the remainder of the 1989-90 school year Kevin will have the opportunity to visit Woburn High School to transition from private to public school setting. This will start as one day weekly and increase to a number of days comfortable to prepare for a full transition in September 1990.

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Parents rejected this IEP in late April 1990 asserting that Kevin should continue to remain at KCS.

In mid July 1990 Woburn requested a hearing. Parents proceeded to obtain counsel. On August 16, 1990 a pre-hearing conference was held but no settlement could be reached. Parents wished to pursue a private evaluation so the hearing was scheduled to give them sufficient time to obtain such evaluation, which was obtained in September-October 1990. Kevin has remained at KCS funded by Woburn as his last agreed upon placement pending this appeal.

ISSUES IN DISPUTE

I. What proposed placement for Kevin H. for the 1990-91 school year appropriately addresses his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment?

II. Does Kevin's recent private evaluation constitute an independent evaluation for which Woburn is financially responsible?

STATEMENT OF POSITIONS

Parents' position is that Woburn's proposed 502.2 IEP and educational placement at Woburn High School is inappropriate to address Kevin's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. Parents contend that Kevin continues to require a 502.5 private day school placement at KCS in order to appropriately address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. In the alternative, Parents argue that Kevin attend Woburn High School 1) with additional special education supports and 2) only then with the guarantee that KCS be available to Kevin as a safety net and that Kevin be allowed to return to KCS if he feels that he cannot handle Woburn High School. Finally, Parents contend that Woburn is responsible for Kevin's recent private evaluation as an independent evaluation.

Woburn's position is that its proposed 502.2 IEP and educational placement for Kevin at Woburn High School (WHS) is appropriate to address Kevin's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. Woburn contends that Kevin no longer requires placement at KCS, which is now too restrictive a setting for him, to appropriately address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment. Finally, Woburn contends that Kevin's recent private evaluation does not constitute an independent evaluation and that Woburn is not financially responsible for such evaluation.

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PROFILE OF STUDENT

Kevin is a 17 year old young man of at least average intelligence. Kevin was administered the Wechsler Intelligence Scale for Children - Revised (WISC-R) in March 1988 (S-20) and the Wechsler Adult Intelligence Scale - Revised (WAIS-R) in October 1990 (testimony, Ms. Dacey). Kevin received the following scores:

Test/Date	Verbal IQ	Performance IQ	Full Scale IQ
WISC-R--1988	112	118	117
WAIS-R--1990	99	117	106

All 1988 WISC-R scores place Kevin within the high average range of intellectual functioning. The 1990 WAIS-R scores continue to place Kevin's Performance IQ within the high averabe range while his Verbal and Full Scale IQ have each dropped, 13 and 11 points respectively, from his Verbal and Full Scale WISC-R scores 2 years previously. Kevin's 1990 WAIS-R scores place his Verbal IQ and his full Scale IQ only within the average range of intellectual functioning.

Kevin was neuropsychologically evaluated at Leahy Clinic in 1982 and 1986 where he was diagnosed as having ADD (testimony, Mr. H.; S-26). On his 1986 Leahy Clinic evaluation (S-26), performed when Kevin had just completed an unsuccessful 6th grade year in Woburn, he received the following grade level (gl) scores on the following test instruments in the following academic areas:

Test Instrument	Grade Level Score
Wide Range Achievement Test Oral Reading	6.6 gl
Gates-MacGinitie Reading Test Silent Reading, Vocabulary and Comprehension	5.8 gl
Spelling	7.2 gl
Math	4.6 gl

The 1986 Leahy Clinic evaluation concluded:

> Kevin is of average intellectual ability who continues to demonstrate characteristics of an attention deficit disorder with mild hyperactivity, associated impulsivity, organization difficulties and poor fine neuromotor development. Although academic skills were at grade level at his initial evaluation, this time he shows lower than grade skills in silent reading, vocabulary and comprehension, written expression and written math.

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He continues to be a pleasant youngster who shows a desire to please but has continued difficulty monitoring and inhibiting his impuslive behaviors.

On academic testing performed at KCS in October 1987 Kevin, than at an 8.2 grade level, received the following grade level (gl) scores in the following areas on the following test instruments (S-13, 18):

Test Instrument	Grade Level Score
Gates-MacGinitie Reading Test	
Vocabulary - Form D	8.4 gl
Vocabulary - Form E	8.7 gl
Comprehension - Form D	6.8 gl
Comprehension - Form E	9.6 gl
Slosson Oral Reading Test	
Comprehension	9.1 gl
Metropolitan Achievement Test	
Math Computation	7.1 gl
Math Concepts	8.1 gl
Math Problem Solving	7.4 gl

On the KCS Educational Assessment dated May 1989 (S-10) near the end of Kevin's 9th grade year at KCS, he was assessed to have excellent reading skills and be an enthusiastic reader; his writing ability including spelling, grammatical usage and organization of ideas to be on grade level; and that he enjoyed discussions and expressive language skills. On the Key Math Test administered in October 1989 (beginning 10th grade) Kevin scored at a 8.1 grade level (S-24).

During his last full year at KCS - 10th grade, 1989-90 - Kevin received the following grades in his academic subjects (See S-3, 4, 5):

Subject	Term 1	Term 2	Term 3	Final Grade
English	B	B-	B+	B
Algebra II	B-	B-	C-	C
World History	B+	C	D	C
Biology	B+	B-	B-	B-
Computers	B-	B-	B-	B-

On academic testing administered by Ms. Dacey as part of Kevin's recent private evaluation, Kevin at an 11.1 grade level, received the following grade level (gl) or percentile (%) scores on the following test instruments in the following academic areas (see testimony, Ms. Dacey):

Test Instrument	Grade Level and/or Percentile Score
Gray Oral Reading Test	
Passage Reading	75%

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Comprehension	84%
Stanford Diagnostic Reading Test	
Reading Comprehension	10.6 gl -- 45%
Vocabulary	10.0 gl -- 38%
Scanning & Skimming	11.9 gl -- 57%
Fast Reading	Post High School -- 72%
Woodcock Johnson Achievement Test-Revised	
Math Calculations	10.7 gl
Applied Problems	8.7 gl
Quantitative Concepts	8.6 gl
Science	8.1 gl
Social Studies	11.7 gl
Test of Written Spelling	
Predictable Words	74%
Unpredictable Words	61%
Total Score	68%

On the Test of Language Competence, Kevin did well in language constructs/skills but suggested some social immaturity. On the Test of Written Language, Kevin's scores were of questionable validity because while his story was creative and cute he did not write enough or respond in a typical way. (See testimony, Ms. Dacey).

On tests measuring attention and organization, Ms. Dacey found that Kevin had deficits at the initial attentional stage, in organizing, and in shifting attention. However, she found self correction features in Kevin not observed in the 1986 Leahy Clinic evaluation. Overall in this area, Ms. Dacey found a gap between what a 17 year old should be doing compared to Kevin's level but also found Kevin's attentional and organizational skills improved and the gap lessened since the 1986 Leahy Clinic evaluation.

On tests of emotional functioning (projective tests) Ms. Dacey found no significant emotional disturbance with Kevin displaying good reality testing, normal aspirations, seeing the world in a normal way and having a wide range of emotions. Ms. Dacey found typical adolescent turmoil plus in the areas of dependence/independence; self esteem issues; unsureness of self; and anxiety over competence. She found Kevin to be more dependent than one would expect for a boy of his age and that Kevin was content being comfortable and not adventurous. She found Kevin to be socially immature with qualities of a younger person around issues concerning areas of homework and responsibility. In interviewing Kevin he expressed concerns regarding peer relationships in and out of school; that he primarily socialized with his younger brother and his friend, both about 13 years old; that he had a poor social life outside of school with no neighborhood friends, not driving or dating and not playing any sports; and that he has had a part time job this past summer which continues currently. (See also testimony of Mr. H.). Ms. Dacey did not find Kevin to be depressed but somewhat sad with a yearning for more but unsure of how to go about it.

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Overall, Ms. Dacey found Kevin to have a disability which is a combination of innate (within his neurological system) attentional and organizational weakness exacerbated by emotional and social constraints which impact upon his learning.

PARENTS' PROPOSED PLACEMENT

Parents propose that Kevin should remain at KCS where he has been educated for the last 4 1/2 years. KCS is a Massachusetts Department of Education approved 502.5 private day school placement. KCS serves a population of learning disabled and/or physically handicapped students, providing a language based educational program and related services as necessary such as speech language therapy, occupational therapy, physical theerapy and counseling. Some students also have attentional and behavioral issues similar to Kevin. Teachers are certified either in moderate special needs or in their academic area of expertise.

KCS has 3 divisions. Kevin is in the high school division in the secondary program which is modelled after a transitional high school with students having homerooms, moving from class to class with different teachers for each subject and various electives, all of which is designed to prepare students for mainstreaming. There are a total of 35 students in KCS's high school secondary program which offers a comprehensive curriculum. No class has more than 10 students in it. Because of the small class size and small school size there is immediate teacher response/feedback and good internal communications/coordination to control behavioral situations. Potential loss of an activity period on Friday afternoons or various school activities and trips are utilized to help Kevin control inappropriate behaviors.

Kevin currently receives the following subjects at KCS: English, daily; science, daily; math, daily plus 2 math tutorials per week; U. S. History 4 times per week; graphic arts 4 times per week; French 3 times per week; word processing twice per week; and art, music and physical education each once per week. Kevin also attends a social skills group with the KCS school psychologist once weekly. Some of the KCS classes such as social studies and English are set up to allow several activities in each class period. Kevin is in the highest academic group in all of his academic classes at KCS.

(See testimony of Ms. Cady; Dr. Talbot; Ms. Lawlor; Mr. Sarkisian; S-22, 23).

SCHOOL'S PROPOSED PROGRAM

Woburn proposes that Kevin be placed at WHS under a 502.2 educational placement. Under Woburn's proposed IEP Kevin would receive special education services in the resource room for one period per day, 5 days per week from Ms. Gatta, a special education teacher at WHS, plus a small group counseling session with the school psychologist, Dr. McDermott, once weekly. The remainder of Kevin's time would be spent within regular education classes at WHS.

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Under Kevin's proposed schedule he would receive the following regular education academic classes daily: English; U. S. History; chemistry; and geometry. He would receive computer math with logo also on a daily basis. He would receive physical education twice per week, health once weekly, and a study period twice weekly. The English, U. S. History and chemistry classes are "academic" college preparatory classes while geometry is a "standard" course but acceptable for college. All academic teachers proposed for Kevin were selected based upon their extensive teaching experience; their interesting and informative classroom presentations; their good classroom control; their backgrounds in working with a variety of ability levels and behavioral needs special education students; their receptivity to Ms. Gatta's suggestions and recommendations in working with special education students; and their ability to get the most out of their students. These regular education teachers generally have various activities and lessons within classes such as reading, class discussions, blackboard work, lectures, films and seatwork. Class sizes are between 17 to 20 students per class.

Ms. Gatta, Kevin's proposed special education resource room teacher, has a bachelor's degree in English, a masters degree in special education and a second masters degree in reading. She is certified in moderate special needs, reading, English and history and has taught in these areas at both an elementary and high school level, having been in her present position at WHS for the last 13 years. Dr. McDermott has a bachelor's degree in psychology, a masters degree and advanced graduate training in counseling, and a doctorate in human behavior and organization. He has been a Woburn school psychologist for the past 17 years.

In Ms. Gatta's special education resource room there woould be 7 students, including Kevin, ages 16-18 in grades 11 and 12. Several students are there for organizational and homework support while the others are there for support in English. For Kevin specifically, Ms. Gatta would check his assignments, help him get started in /complete/ oversee his homework, assist him in his regular education subjects as necessary, provide organizational support, and monitor his overall progress. Ms. Gatta would meet with Kevin's teachers and explain to them Kevin's background, strengths, weaknesses and appropriate strategies to utilize in their classes. Ms. Gatta then plans to meet with each of Kevin's teachers on a weekly basis to discuss Kevin's progress in their classes, to provide consultation and support, to suggest behavioral techniques and to modify curriculum where necessary. Ms. Gatta also sends forms to regular education teachers to evaluate her special education students mainstreamed into their classes twice each term. Further, Kevin will keep a daily notebook to record homework assignments and for each teacher to fill in and sign each day, which is to be used as a communication device between Ms. Gatta and Kevin's regular education teachers regarding Kevin's behavior and academic progress. If Kevin prefers either an art, music, French or introductory logo course, one of these subjects could be substituted for his computer math with logo class. Kevin would be able to use the computer/word processor in the resource room for homework assignments and papers. Also Kevin could go to Ms. Gatta's

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class in lieu of his 2 study periods per week.

Small group counseling would consist of 2-3 other students in addition to Kevin. These sessions would employ opportunities for the students to appropriately express themselves in addressing issues that concern them. Techniques such as role modelling, brainstorming, peer interaction stragegies and discussion of alternative ways of dealing with emotions will be employed.

(See testimony of Ms. Gatta; Mr. Sheeran; S-2, 22, 25).

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Kevin H. is a student with special education needs as defined under state and federal statutes and regulations. The parties are also in essential agreement regarding the nature, extent and manifestations of Kevin's special education needs. The fundamental issues in dispute are those listed under **ISSUES IN DISPUTE**, above.

Based upon 3 full days of oral testimony, the written documentation introduced into evidence and a review of the applicable law, I conclude:

I. That Woburn's proposed 502.2 educational program at Woburn High School, with several modifications/amplifications/clarifications is appropriate to address Kevin's special education needs so as to assure his maximum possible educational development in the least restrictive educational environment;

II. Kevin's recent private evaluation does not constitute an independent evaluation as contemplated by the regulations. Therefore, Woburn has no financial responsibility for this evaluation.

My analysis follows.

I.

Kevin is a young man of at least average intelligence. He has no primary specific learning disability as that term is defined in 20 U.S.C. 1401(a)(15), 34 CFR 300.5 or 34 CFR 300.541. He has no primary language, visual, auditory, motoric or emotional disability as these terms are commonly understood and utilized by professionals practicing and teaching in the special education field. Kevin tests from above grade level to approximately 2 years below grade level, depending upon the subject area tested and the test instrument utilized. Kevin functions approximately at grade level in his subjects at KCS. Kevin has been found to have an Attention Deficit Disorder but he requires no medication for his ADD. Kevin's area of disability, as articulated by Ms. Dacey, is an attentional and organizational weakness exacerbated by some emotional and social constraints which impact upon his learning. (See **PROFILE OF STUDENT**, above).

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The testimony is virtually unrebutted that Kevin has made academic, emotional/behavioral, attentional and social progress at KCS. (See testimony Ms. Cady; Ms. Lawlor; Dr. Talbot; Mr. Sarkisian; Mr. Sheeran). Indeed, Kevin has been functioning in the highest academic group possible for his grade level for at least the last several years at KCS; he functions close to, at, or above grade level in his KCS classes; and he is a top academic student at KCS. (See testimony Ms. Cady; Ms. Lawlor).

Based upon the evidence presented, I conclude that there is no academic justification for Kevin to remain in a 502.5 private day school placement at KCS where he spends his entire school day with other special education students.

The concerns of Parents, KCS staff and Ms. Dacey focus upon the size of Woburn High School; the size of Kevin's classes at WHS; the degree of support Kevin will be able to receive at WHS; the ability of Kevin's WHS teachers to deal with Kevin's behaviors; the ability of Kevin's teachers to communicate and be able to deal with Kevin in a consistent manner; and that Kevin will have a contact person who he can quickly access if there is a problem and who can oversee and coordinate his program. In sum, Parents' witnesses are concerned about Kevin's ability to adjust to and interact in a new environment; whether he is socially and behaviorally ready for such a change; and whether WHS will be able to deal with Kevin in such a way as to ensure that his experience at WHS will be successful.

A review of the testimony of the KCS witnesses demonstrates that Kevin's behaviors, while socially immature for his age, are relatively minor. Kevin is easily distracted. He sometimes comes to class unprepared. He has periods when completing homework is a problem. He may drop his pencil or poke a classmate with his pencil. He can be impulsive. Kevin sometimes talks out or laughs inappropriately. He may run, push or be noisy in the corridors, use the wrong stairway or slam his locker. He often needs to be reminded to get to his next class. In the past he has sometimes behaved inappropriately in the lunchroom. However, Kevin is <u>not</u> aggressive, threatening, defiant or malicious in any way. Rather his acting out behaviors appear to be in the nature of mild to moderate disruptive behaviors. It is the frequency and quantity and not the quality of such behaviors that is problematic, i.e., Kevin can be corrected for a behavior and he will stop and acknowledge his behavior but a day or two later do the same thing. While Kevin's behaviors may appear to be willful or intentional misconduct, these are not deliberate behaviors by Kevin who has trouble controlling these behaviors since he has not fully internalized inner behavioral controls and skills of responsibility and accountability. (See testimony Ms. Lawlor; Dr. Talbot; Ms. Cady).

There is a consistent theme in the testimony of the various KCS witnesses regarding how they assist Kevin in controlling his behaviors and how he responds to their interventions. Kevin is accorded preferential seating, i.e., he is seated close to the teacher enabling the teacher to maintain direct eye contact with Kevin. Kevin responds well to verbal redirection and refocusing from the teacher especially if done in a manner that does not embarrass him in front of his peers.

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Asking Kevin a question will being him back on task as well as a touch on the shoulder or verbal cues, all of which can often be done without stopping the class and focusing undue attention on Kevin. Verbal reminders also help him be prepared for and proceed to his next class, remember school rules and conform his behaviors. It is not difficult to bring Kevin back on task as he is very willing to be brought back on task. He is carefully observed during science experiments. Kevin has an understanding of what is expected of him and he has become more aware of his behaviors but is not always capable of carrying the process through. However, he demonstrates a willingness to conform when brought back on task or corrected, immediately stops inappropriate behaviors when corrected and often apologizes. The threat of loss of a school function, trip or activity helps control Kevin. He responds well to authority figures and to challenging but not frustrating academics. Strategies that actively engage him in the learning process work well with Kevin and he is generally an active class participant as well as in his group counseling sessions. If Kevin does not turn in his homework, a warning that it must be done by the next day or it will not be accepted by the teacher usually results in Kevin completing and submitting his assignment. (See testimony of Ms. Lawlor; Dr. Talbot; Ms. Cady; Mr. Sarkisian).

I find none of Kevin's observed behaviors, either individually or collectively, to require continued placement in the restrictiveness of a 502.5 private day school setting. Based upon the testimony presented, I conclude that Kevin's behaviors can be appropriately addressed within the framework of a public school setting. I further find that none of the above strategies which are effectively utilized with Kevin by KCS staff are exceptionally sophisticated or require any extensive or specialized training. These are strategies and techniques that can be employed by any competent, certified, experienced teacher and no evidence has been presented which would allow me to conclude that such strategies and techniques could not be employed with Kevin at WHS. Indeed, the evidence demonstrates that the opposite conclusion is warranted. I note the testimony of Ms. Cady that Kevin requires no academic modifications at KCS; that there is no reason to believe that WHS could not utilize many of the techniques employed at KCS; and that to teach Kevin does not require any special training but simply an awareness and sharing of the strategies as listed above. I further note the testimony of Ms. Lawlor that the techniques she employs in her English class of 10 students could also be employed in classes with double that number, i.e., 20 students in the class. Finally, I note the testimony of Dr. Talbot and Ms. Cady about the benefit for Kevin of modelling appropriate social behavior from socially higher functioning students.

I find it most significant that no KCS witnesses unequivocally endorsed Kevin's continued placement at KCS or unequivocally stated that Kevin's special needs require that he remain at KCS. All acknowledged that Kevin's return to a public school setting was close at hand. Ms. Cady most succintly summarized what collectively appears to be KCS's general position: That Kevin certainly should be able to be transitioned back into a public school setting under the right conditions, i.e., appropriate awareness and support of Kevin as specified in detail above.

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Significantly, in examining the testimony of KCS witnesses, I find that these witnesses acknowledge that many of their concerns have been addressed in Woburn's proposed IEP and/or through the testimony of Woburn witnesses. It is also significant that none of the KCS witnesses have ever observed Kevin in larger class settings than at KCS and none of the KCS witnesses have ever observed WHS. Therefore, while I place great weight on the testimony of the KCS witnesses regarding their knowledge of and work with Kevin, their testimony speculating upon the effect upon Kevin in larger classes at WHS has little or no factual basis or foundation.

Both state and federal special education law mandate that private or separate school placement occur only when the nature or severity of the student's special need or handicap is such that education in a less restrictive prototype/regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. See 603 CMR 28:502.5; 34 CFR 300.550(b). Based upon the totality of evidence presented at this hearing, I conclude that Kevin does not require the restrictiveness of a 502.5 private day school placement to maximally address his special education needs.

Based upon her recent evaluation of Kevin, Ms. Dacey testified as to the features she believes are necessary for Kevin to progress in an educational program. They consist of: 1) An anchor person for Kevin who would help him during his transition, help him address his attentional problems via attentional and self monitoring strategies, help in developing homework routines, study skills, note taking, test preparation and time planning. This anchor person would also act as school-home liaison, serve as liaison to Kevin's teachers and counselor and be sensitive to Kevin and available to talk to him on a daily basis; 2) A counseling component to deal with issues of school/life adjustment, peer relationships, self-esteem and social maturity; 3) A vocational component, i.e., a forum to realistically consider what he can do after high school and to focus his goals. Ms. Dacey sees a person such as the anchor person who will have a good overview of Kevin both academically and emotionally, who will know what the realistic demands of a student are in college and who will know what alternatives are available, to begin this process with Kevin; 4) Discipline and behavioral expectations for Kevin should be clearly defined, discussed, laid out and structured for Kevin with consequences for inappropriate behavior made clear and then consistently and equitably enforced, understanding Kevin's disability.

I conclude that many of Ms. Dacey's numerous recommendations have been addressed either via the proposed IEP and/or via the testimony of Ms. Gatta explaining her role. Not all of Ms. Dacey's recommendations have been addressed and Ms. Dacey does not believe Woburn's IEP is appropriate for Kevin. However, in evaluating Ms. Dacey's numerous recommendations, I must consider that Ms. Dacey did her evaluation just prior to this hearing and testified before her report was even reduced to written form. Therefore, the first time Woburn was made aware of any of her recommendations was via her testimony on the final day of this hearing. I must also consider that this evaluation was

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requested by Parents only after knowing that this case was scheduled for hearing and that Ms. Dacey testified that Parents expressed to her their preference that Kevin remain at KCS. I must consider that Ms. Dacey has never observed Kevin at KCS or within any larger setting nor spoken with any of Kevin's KCS teachers. Finally, I must consider the many positive things Ms. Dacey reported about her observation of several of Kevin's proposed classes at WHS including teacher receptivity to having Kevin in their classes; no concern over their ability to personally handle Kevin in their classes; their good relationship, mutual respect and style of communication with Ms. Gatta and vice versa; and their well controlled, well run classes as well as nothing disturbing within the general school environment such as the corridors. (See testimony of Ms. Dacey).

With the modifications/amplifications/clarifications to be addressed below, I conclude that Woburn's proposed placement is appropriate to address Kevin's special education needs so as to assure his maximum possible educational development and does so in the least restrictive educational environment consistent with that goal. Regular education teachers and classes have been carefully selected for Kevin. As Kevin's special education teacher and liaison, Ms. Gatta will teach, provide organizational support and personally interact with Kevin on a daily basis and meet with each of his regular education academic teachers on at least a weekly basis. Ms. Gatta clearly fulfills the anchor person role contemplated by Ms. Dacey. Additionally, Ms. Gatta's class with Kevin is scheduled near the end of Kevin's school day so that Ms. Gatta can best help Kevin organize his homework and deal with any problems he has experienced during the course of his school day. A weekly counseling component is also part of Kevin's proposed IEP. (See **SCHOOL'S PROPOSED PROGRAM**, above).

In consideration of Kevin's special needs and the recommendations and areas of concern expressed by the KCS staff and/or Ms. Dacey in their testimony, I order the following modifications/amplifications/clarifications to Woburn's proposed IEP for Kevin and Kevin's transition from KCS to Woburn High School:

1. Ms. Gatta conduct an updated observation of Kevin at KCS followed by a meeting between Ms. Gatta and appropriate KCS staff regarding Kevin's current academic position (precisely where he is in each of his various academic subjects at this point in time) and any current behavioral concerns in these academic classes.

2. Some contact (either by phone or in person) between Kevin's current counselor, Mr. Sarkisian, and Woburn School Psychologist, Dr. McDermott, to discuss what Kevin is doing in his current small group counseling sessions at KCS and how best to ease Kevin into his small group counseling sessions with Dr. McDermott.

3. A meeting between Ms. Gatta and Kevin's proposed regular education teachers at WHS to apprise them of Kevin's services under his IEP, his current academic and behavioral status, those strategies and techniques which work best

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with him at KCS, any additional modifications that may be necessary at WHS (such as especially close observation or modifications during science experiments), and Kevin's continual need for reminders and reinforcement regarding academic and behavioral expections.

4. A meeting between Ms. Gatta and the person who will be Kevin's primary authority figure/disciplinarian at WHS to apprise such person of Kevin's behaviors as manifestations of his disability and not willful or deliberate misconduct; and to discuss appropriate discipline, if the need should arise, given such disabilities.

5. Upon Kevin's enrollment at WHS, a meeting between Kevin, Ms. Gatta, Dr. McDermott and Kevin's teachers regarding academic and behavioral expectations in each class and consequences if such expectations are not met. Also, general school rules should be clearly explained to Kevin.

6. In addition to Ms. Gatta's weekly individual meetings with each of Kevin's WHS academic teachers on rotating days, Ms. Gatta shall meet with these teachers, as a group, at least once weekly to discuss Kevin's adjustment and progress, what is working well for him, to share mutual concerns and to assure coordination and consistency in approach. These weekly group meetings should occur for at least the first 6 weeks during Kevin's enrollment and then periodically on an as needed basis, as determined by Ms. Gatta.

7. During Kevin's 2 scheduled study periods per week he go instead to Ms. Gatta's classroom. This should cut out "down time" which may be problematic for Kevin, allow him more time to interact with Ms. Gatta and allow Ms. Gatta to begin initial vocational exploration/focus with Kevin. When Kevin appears ready, one of these periods per week should be made available for him to visit the guidance counselor to further explore and refine college/vocational options.

I understand Parents reluctance for Kevin to leave KCS. However, Kevin has been at KCS for 4 1/2 years, voluntarily placed their by Woburn. He was 13 years old when he was placed at KCS. He is now 17 1/2 years old. Due to KCS plus maturation, Kevin has progressed academically, socially and behaviorally. Mr. H. tesified that he agrees that Kevin is overprotected and not challenged enough at KCS, that he has not reached his potential and that he requires more of a challenge. Ms. Dacey testified that she is concerned that Kevin has been at KCS for more than 4 years; that he has not had enough growing experience; is concerned that the comfortableness and safeness of KCS may foster dependence rather than independence; and that it is important that Kevin's independence be fostered. (See also testimony of Ms. Cady; Dr. Talbot). Mr. H. testified it is rash for Woburn to move Kevin less than 2 years from graduation. Yet previous attempts by Woburn over the past several years to transition Kevin to WHS have been rejected by Parents. (See **STATEMENT/HISTORY OF THE CASE**, above). Kevin has academic capabilities for college or some type of post high

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school educational experience and he has made overall progress over the past 4 years. However, unless Kevin is given the opportunity to develop greater competency in the areas of responsibility, independence, confidence and autonomy, his educational potential may never be fulfilled. Being allowed the opportunity to participate in a more normalized high school student experience at WHS with regular education peers of his chronological age and achievement levels as behavioral, social and academic role models should allow Kevin to develop the responsibility, independence and confidence that will be necessary in order for him to be successful in any type of post high school adult activity.

Finally, I cannot condition my **ORDER** with any guarantee that Kevin be allowed to return to KCS if he feels that he cannot handle WHS. (See testimony of Mr. H.). Legally, I cannot allow such a decision to be left under the sole control of the student. Furthermore, Kevin's situation clearly does not fit the criteria for an 8 week diagnostic placement pursuant to 603 CMR 28:502.9. Therefore, I cannot order a diagnostic placement as suggested by Parents.

II.

Parents contend that Woburn is responsible for funding Kevin's most recent private evaluation, performed at Parental request by Ms. Dacey, as an independent evaluation. Woburn contends that such evaluation does not constitute an independent evaluation and that Woburn has no financial responsibility for such evaluation.

Independent evaluations are governed by 603 CMR 28:328 and 34 CFR 300.503. Re-evaluations are governed by 603 CMR 28:334 and 34 CFR 300.534(b). 603 CMR 28:328.1 provides that parents shall have the right to obtain an independent evaluation after the school system has completed its team evaluation. Emphasis added. 34 CFR 300.503(b) provides parents the right to a publicly funded independent evaluation if the parent disagrees with an evaluation obtained by the public agency. Emphasis added. 603 CMR 28:334 provides that a school shall provide a re-evaluation for the student if such a re-evaluation is recommended by a participant at the annual review meeting (603 CMR 28:333) and, in any event, not less than every 3 years, all subject to parental consent. 34 CFR 300.534(b) is essentially identical. While there are no statutory or regulatory provisions delineating specific timelines for independent evaluations, two Education of the Handicapped Act Policy Letters issued by the United States Department of Education/Office of Special Education Programs (See EHA/OSEP Policy Letters - EHLR 213:259 at 263 and 16 EHLR 606 at 608) hold that such timelines must be reasonable and that it is not unreasonable for a public agency to deny parent reimbursement for an independent evaluation conducted 2 years after the public agency's evaluation. Emphasis added.

Kevin was last evaluated/assessed, per Parental consent, in May 1988, jointly by Woburn and KCS staff. (See testimony of Mr. Sheeran; S-13, 14, 15, 16, 10). Since that time Woburn has promulgated Kevin's 1988-89 IEP, his 1989-90 IEP and his 1990-91 IEP based upon that

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evaluation and based upon its annual review of Kevin, a review of Kevin's progress reports at KCS and information presented by KCS staff about Kevin. Kevin is due for his 3 year re-evaluation in May 1991. At the time of Kevin's May 1988 TEAM evaluation Parents expressed no disagreement with the results of that evaluation. (See testimony of Mr. Sheeran). Since that evaluation Parents have accepted, accepted in part and rejected 3 IEPs (S-13, 9 and 2 respectively) and have never requested an independent evaluation or postponed any decision until the completion of an independent evaluation, although both options were provided for on each of those 3 IEPs. At a pre-hearing conference on August 16, 1990 Parents' counsel expressed Parents wish to have an outside, private evaluation completed and this hearing was scheduled to allow Parents the time to obtain such evaluation. (See **STATEMENT/HISTORY OF THE CASE**, above).

Based upon the above, I conclude that Woburn is not financially responsible for Ms. Dacey's evaluation of Kevin. At no time after Kevin's last publicly funded evaluation by Woburn and prior to the initiation of this hearing by Woburn have Parents ever expressed any disagreement with that evaluation. Parents sought a private, outside evaluation only after Woburn's initiation of the appeals process, some 2 1/4 years after Kevin's last public agency evaluation. Consistent with EHA/OSEP policy, I do not find Woburn's refusal to fund Ms. Dacey's evaluation unreasonable under the circumstances presented in this case. Parents have presented no testimony nor legal argument as to why Ms. Dacey's evaluation should be considered an independent evaluation. I conclude that Ms. Dacey's evaluation falls within the ambit of 603 CMR 28:328.1, to wit:

> The parent may also obtain, at private expense, an independent evaluation of the child by any specialist.

ORDER

1. With the modifications/amplifications/clarifications enumerated in Section I of the DECISION above, Woburn's proposed 502.2 educational program for Kevin H. at Woburn High School is appropriate to address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment.

2. Kevin's recent private evaluation by Ms. Dacey does not constitute an independent evaluation as contemplated by state and federal regulations. Woburn Public Schools has no financial responsibility for such evaluation.

Raymond Oliver
Raymond Oliver, Hearing Officer

December 13, 1990
Date

42-202

ДЛЯ ВНУТРЕННЕЙ ЭКСПЛУАТАЦИИ

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF EDUCATION

BUREAU OF SPECIAL EDUCATION APPEALS

JAN 16 1991

In re: Kevin H. **BSEA #91-0069**

DECISION ON MOTION FOR RECONSIDERATION

On December 13, 1990 a DECISION was rendered in the above-entitled matter. That DECISION is totally incorporated herein, by reference. Briefly, the DECISION found as follows:

ORDER

1. With the modifications/amplifications/clarifications enumerated in Section I of the DECISION above, Woburn's proposed 502.2 educational program for Kevin H. at Woburn High School is appropriate to address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment.

2. Kevin's recent private evaluation by Ms. Dacey does not constitute an independent evaluation as contemplated by state and federal regulations. Woburn Public Schools has no financial responsibility for such evaluation.

On December 28, 1990 Parents filed a MOTION FOR RECONSIDERATION followed on January 3, 1991 with a memorandum in support of its position. On January 7, 1991 Woburn Public Schools (Woburn) filed its RESPONSE IN OPPOSITION TO PARENTS' MOTION FOR RECONSIDERATION.

Parents allege four grounds for Reconsideration characterized as errors of law as follows:

I. The denial of Parents' request to return Kevin to Krebs-Cotting School (KCS) if Woburn High School (WHS) does not meet Kevin's needs was not supported by the evidence on the record.

II. Insofar as the modifications to Woburn's proposed Individual Education Plan (IEP) in the DECISION and ORDER fail to provide for any parental involvement in the planning, implementation or monitoring of Kevin's transition to WHS they are not supported by the evidence on the record.

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III. The failure to order Woburn to convene the TEAM after completion of the meetings and observations ordered in the DECISION for the purpose of incorporating the specific recommendations from these meetings and observations into an amendment to Kevin's IEP.

IV. The determination that Woburn is not financially responsible for the evaluation conducted by Ms. Dacey.

Woburn's response to Parents' allegations is as follows:

The Woburn School Committee has decided to adopt your (the Hearing Officer's) Decision in the above-captioned matter as its response and opposition to the Parents' Motion for Reconsideration.

A formal response is not required, and would only serve to legitimize a meritless Request for Reconsideration, and further the Parents' objective of continuing the Committee's obligation to fund an inappropriate private school placement.

RULING

I have carefully reviewed Parents' MOTION FOR RECONSIDERATION and accompanying memorandum; Woburn's RESPONSE IN OPPOSITION TO PARENTS' REQUEST FOR RECONSIDERATION; and the GROUNDS FOR RECONSIDERATION. I have also carefully reviewed the original DECISION. Finally, I have reviewed the testimony pertaining to the issues raised in PARENTS' MOTION FOR RECONSIDERATION, as well as the applicable law.

The grounds for a motion for reconsideration are limited to serious errors of law or misconstruction of pertinent rules, regulations, policies or procedures. I conclude that such grounds have not been met by Parents. Therefore PARENTS' MOTION FOR RECONSIDERATION is DENIED. I briefly address each of Parents four arguments below.

I.

Only Mr. H., Kevin's father, testified that KCS should be available to Kevin as a safety net and that Kevin be allowed to return to KCS if he feels that he cannot handle WHS. No other witnesses testifying for either Parents or Woburn espoused this concept. None of Kevin's KCS teachers nor Ms. Dacey, Parents' private evaluator, testified in support of Parents on this point. Therefore, no professional testimony supported an educational justification for such a position nor offered any educational criteria, which ought to trigger such an occurrence. Indeed, Mr. H. himself testified that he wouldn't want to see Kevin return to KCS if he began at WHS. Finally, the FINDINGS AND CONCLUSIONS section of the DECISION is replete with references to the testimony of Parents' witnesses which clearly contradict Parents' position that KCS should remain available to

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Kevin as a safety net, and that he be allowed to return to KCS if he feels that he cannot handle WHS. Several examples suffice:

> I find it most significant that no KCS witnesses unequivocally endorsed Kevin's continued placement at KCS or unequivocally stated that Kevin's special needs require that he remain at KCS. All acknowledged that Kevin's return to a public school setting was close at hand. Ms. Cady most succinctly summarized what collectively appears to be KCS's general position: That Kevin certainly should be able to be transitioned back into a public school setting under the right conditions, i.e., appropriate awareness and support of Kevin as specified in detail above. (DECISION, p. 11)

> Significantly, in examining the testimony of KCS witnesses, I find that these witnesses acknowledge that many of their concerns have been addressed in Woburn's proposed IEP and/or through the testimony of Woburn witnesses. (DECISION, p. 12).

> Mr. H. testified that he agrees that Kevin is overprotected and not challenged enough at KCS, that he has not reached his potential and that he requires more of a challenge. Ms. Dacey testified that she is concerned that Kevin has been at KCS for more than 4 years; that he has not had enough growing experience; is concerned that the comfortableness and safeness of KCS may foster dependence rather than independence; and that it is important that Kevin's independence be fostered. (See also testimony of Ms. Cady; Dr. Talbot). (DECISION, p. 14).

I conclude that the Hearing Officer's DECISION on this point was clearly not against the weight of the evidence and was not an error of law.

II.

Parents argue that modifications/amplifications/clarifications #3, 4 & 5 which order transitional meetings between proposed service providers of Kevin, including Kevin himself upon his enrollment at WHS (#5), each require parental participation. Parents' cite 34 CFR 300.342(a); 34 CFR 300.345(a); and 603 CMR 28:311.3 in support of their contention. However 603 CMR 28:311 and its various subparts refer to a TEAM meeting for writing a student's IEP. A careful reading of 34 CFR 300.342(a) and 300.345(a) reveal that these regulations refer to meetings described in 34 CFR 300.343. The meetings described in 34 CFR 300.343 clearly correspond to the TEAM meeting described in 603 CMR 28:311. Kevin's TEAM meeting, with parental participation, took place in April 1990 and resulted in the IEP that was the subject matter of this DECISION. The meetings ordered by the DECISION in modifications/amplifications/ clarifications #'s 3, 4, & 5 are merely transmission of information/ transitional meetings designed to ease Kevin's transition from KCS to WHS. Such meetings are not three separate TEAM meetings for the purpose of promulgating IEPs for Kevin.

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I conclude that the Hearing Officer's DECISION on this point was neither against the weight of the evidence nor any error of law.

III.

Parents argue that the omission of an order to Woburn to convene the TEAM after completion of the observation and meetings ordered in the DECISION for the purpose of incorporating the specific recommendations from these meetings and observation into an amendment to Kevin's IEP constitutes an error of law. Parents cite 603 CMR 28:333, 334, and 335 and 34 CFR 300.343, 344, and 345 in support of their contention. All of the regulations cited refer to a TEAM meeting as a result of a review or of a re-evaluation. The modifications/amplifications/clarifications ordered by the Hearing Officer are not the result of a TEAM process or a TEAM consensus, but are the result of a Hearing, Decision and Order following the parties inability to reach any agreement on their own. In the instant case the Hearing Officer found Woburn's IEP to be appropriate, but ordered seven specific modifications/ amplifications/clarifications. The first five relate to specific transitional observation/contact and transitional meetings, the last meeting including Kevin upon his WHS enrollment. The last two add a weekly group teachers meeting for Kevin's teachers for at least his first 6 weeks at WHS and substitutes two periods in the resource room in lieu of two study periods.[1/] 603 CMR 28:402.10 mandates that Woburn shall implement the program ordered by the Hearing Officer subject to the consent of the Parents. Neither Woburn nor Parents have any discretion to expand or alter Kevin's IEP until the seven modifications/amplifications/clarifications are carried out.[2/] Parents contend that Kevin's IEP will have to be amended after a TEAM meeting to incorporate "specific recommendations" from the ordered meetings. They may be correct. It must be remembered that Kevin has not been a student within Woburn Public Schools for the last 4½ years and until such ordered observation and meetings take place neither Parents nor Woburn know what, if any, those "specific recommendations" may be. After the seven modifications/ amplifications/clarifications have been implemented and Kevin has been transitioned into WHS such a TEAM meeting might be warrented, based upon the ordered transitional meetings and Kevin's adjustment to and performance within his new WHS environment. However, the failure to specifically order such a TEAM meeting does not constitute an error of law.

1/Actually, only one period will be involved since one of these two study periods must be utilized for Kevin's weekly group counseling session with Dr. McDermott. Such counseling period was not included on Kevin's proposed WHS schedule.

2/Except for the weekly group counseling period referred to in the prior footnote.

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IV.

Parents argue that the determination that Woburn is not responsible for the evaluation conducted by Ms. Dacey is an error of law and that the Hearing Officer's reasoning is contradictory. Parents contend that they have an absolute right to an independent evaluation at Woburn's expense citing the State Plan in conformance with the requirements of 34 CFR 300.503 as interpreted by OSEP. According to Parents' own memorandum citing EHLR 213:259 - an Education of the Handicapped Act Policy Letter issued by the United States Department of Education/Office of Special Education Programs (EHA/OSEP Policy Letter):

> The only conditions that may be placed on LEA payment for an independent evaluation are that the evaluator be appropriately qualified, that fees be reasonable under the circumstances of the case, and that the request be made within a reasonable time after the LEA's evaluation. Parents' Memorandum at page 6. Emphasis added.

However, this very EHA/OSEP Policy Letter cited by Parents was cited by the Hearing Officer in the DECISION (page 15), since EHLR 213:259 also holds at 213:260 and 262 that it is not unreasonable for a public agency to deny parent reimbursement for an independent evaluation conducted two years after the public agency's evaluation. Emphasis added. Therefore, Parents' request for an independent evaluation 2¼ years after the Woburn evaluation is not a "request [made] within a reasonable time after the LEA's evaluation," as argued in Parents' own memorandum.

Parents also argue that they requested an independent evaluation only four months after their rejection of the IEP leading to this hearing, thus their request was timely. However, Parents confuse their right to request a re-evaluation (another TEAM evaluation) with their right to request an independent evaluation. Had Parents requested a re-evaluation (before the mandatory 3 year re-evaluation), such as at Kevin's last annual review TEAM meeting, Woburn would have been required to re-evaluate Kevin. Upon such Woburn re-evaluation, Parents would then have been entitled to an independent evaluation. However, it is clear from both the state and federal regulatory framework and the EHA/OSEP Policy Letters interpreting same (See Section II of DECISION, page 15, ¶ 2), that the right to an independent evaluation is predicated upon the TEAM/LEA/public agency evaluation and the request for an independent evaluation must be within a reasonable time after the TEAM/LEA/public agency evaluation. As stated in the DECISION, in the instant case Parents request for an independent evaluation came 2¼ years after Kevin's TEAM evaluation in May 1988 and, consistent with EHA/OSEP policy, Woburn's refusal to fund Ms. Dacey's evaluation was not found to be unreasonable under the circumstances presented in this case.

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I conclude that the Hearing Officer's DECISION on this point was not an error of law.

Finally, while Parents have always contended that the funding for Ms. Dacey's evaluation would be an issue for this appeal, I reiterate what was stated page 15 of the DECISION, to wit:

> Parents have presented no testimony nor legal argument as to why Ms. Dacey's evaluation should be considered an independent evaluation.

Parents presented no evidence during the hearing and presented no legal argument in their closing brief for this appeal to support their contention that Woburn was responsible for funding Ms. Dacey's evaluation. The first time Parents presented any argument regarding this point was in their memorandum of law in support of their MOTION FOR RECONSIDERATION -- after having had ample time to offer evidence or argument during the hearing; after having had ample time to argue this issue within their closing brief; and after having received an adverse DECISION on this issue. "Reasonableness" and "timeliness" dictate that such issue properly should have been raised prior to the issuance of a DECISION and not raised for the first time in a MOTION FOR RECONSIDERATION.

ORDER

Parents' MOTION FOR RECONSIDERATION is DENIED.

Dated: January 16, 1991

Raymond Oliver
Raymond Oliver
Hearing Officer
Bureau of Special Education
Appeals

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4/9/91

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

RE: JENNIFER C. AND THE LEXINGTON PUBLIC SCHOOLS BSEA #91-0305

DECISION

This decision is issued pursuant to 20 U.S.C. 1401 et seq., M.G.L. chs. 30A, 71B and the Regulations promulgated thereunder.

A hearing in the above-noted matter was convened on November 19, 1990, in Lexington, MA, and thereafter on November 20, 27, December 10, 13, 1990 and January 7, 11, 25, 28, 1991 and February 4, 1991. The following persons were in attendance for all of part of the proceedings:

Grace B.	Parent
Lester Blumberg	Attorney for Parent/Child
Paul Lombard	Administrator of Special Education, Lexington Public Schools (hereafter LPS)
Robert Fraser	Attorney, LPS
Robert Brown	Special Needs Teacher, LPS
Warren Winslow	Social Studies Teacher, LPS
Sumner Richards	Science Teacher, LPS
M. Margaret Read	Speech/language pathologist, LPS
Rachel Rosenblum	LICSW, LPS
Mary Ellen Efferen	Shriver Center
Lillian Dinklage, Ed.D.	Psychologist, LPS
Gayle O'Grady	Assistant Teacher, LPS
Pamela Houlares	Principal, Clarke Middle School
Myles Slosberg	Attorney (Observer), Stoneman, Chandler and Miller
Marsha Chaskelson, Ph.D.	Licensed Psychologist
Karl Pulkkinen	Landmark School
Reece Erlichman	Hearing Officer

ISSUES PRESENTED

Is the IEP proposed for Jennifer C. by LPS (covering the period September 1990 - June 1991) reasonably calculated to assure her maximum feasible educational benefit in the least restrictive environment consistent with that goal? If it is not, would a residential placement at the Landmark School meet said standard?

PROFILE (See Exhibits S-5, P-1, P-21, S-2; refer to testimony Mr. Brown, Ms. Read, Dr. Dinklage, Ms. Efferen, e.g.)

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Jennifer C., age 14, has been diagnosed by educators as well as multi-disciplinary evaluators as a student of low average (to average) cognitive ability, who presents with serious language and learning disabilities*, (with severe underlying memory deficits), attentional difficulties and emotional needs. As a result of her constellation of special needs, Jennifer's academic performance has been severely compromised, such that she presents with significant grade level deficits in all areas of academic skill development**. (Note, by way of example, that as per the June 1990 IEP under appeal Jennifer is noted to be working in a controlled reading group at the 2.0 - 3.0 grade level, and at the 3.0 - 4.0 level with a specialist on a 1:1 basis. Similar deficits of 3-5 years exist in other skill areas, see Chart of Test Scores, infra.)

In terms of her social development, Jennifer is a well-adjusted adolescent who interacts well with mainstream peers on a social level. Difficulties do do exist however with regard to her view of herself as a learner and her awareness of her inability to compete successfully in the academic arena.

EDUCATIONAL HISTORY (Refer to testimony Ms. B., Mr. Lombard)

Jennifer's educational career may be summarized as follows. She commenced attendance in the LPS in the spring of her kindergarten year, which class she then repeated. During grade 1, she underwent a TEAM evaluation, pursuant to which she participated in a substantially separate learning disabilities classroom for grade 2. The family moved to Waltham for Jennifer's third grade year, where she likewise attended a self-contained classroom. Upon returning to Lexington, Jennifer re-entered the system and was assigned to a 502.4 program (at the Bridge School) for students with social/emotional/learning difficulties, in which program she remained for grades four and five (Exhs. P-4, P-6, P-18, P-19). For grade 6 she moved on to the Clarke Middle School and was placed in Mr. Brown's substantially separate class for learning disabled students (pursuant to which she was mainstreamed for science and electives, Exh. P-5). Her seventh grade year found her in yet another program, this the "LABB"*** class. (See Exh. S-2, P-3, 502.4 prototype IEP covering the period September 1989 -

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*Much debate focused on the severity of Jennifer's language based learning disability, with parents contending that it is properly characterized as severe, and Lexington assessing it as "moderate to severe" (Mr. Brown/Ms. Read) and "serious" (Dr. Dinklage). Sementics aside, the record is clear that Jennifer is a child with a significant disability which has had a profound adverse impact upon her academic development

**reading, writing, spelling, vocabulary, math

*** a more functional, pre-vocational/life skills/remedial program

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June 1990.) In March of 1990 an IEP was proposed calling for Jennifer's continued placement in the LABB program for the following year. This plan was rejected by parent in April, 1990 (Exh. S-4, P-2). Subsequent to this rejection, in June 1990, a new plan was proffered by LPS calling for Jennifer's placement in Mr. Brown's 502.4 prototype classroom at the Clarke School, and providing for delivery of (1) study skills, English, math and social studies within the special education setting; (2) speech/language services three times per week; (3) psychotherapy 1 hour per week; (4) mainstreaming with support for science, and (5) participation in mainstream electives. This IEP was rejected in July 1990 and is the subject of the instant appeal. (See Exh. S-5, P-1.) It should be noted that the parties agreed to provision of services pursuant to this rejected IEP during the pendency of this hearing.

STATEMENT OF THE EVIDENCE

1. Ms. B., Jennifer's mother, presented testimony regarding Jennifer's developmental and educational history (highlighted below), noting in part that domestic problems involving father's alcoholism existed during Jennifer's early elementary school years, culminating in parents' divorce and necessitating a temporary move from Lexington to Waltham.

This witness indicated that in 1987, at the suggestion of Jennifer's then teacher that Ritalin might prove helpful to her daughter, Ms. B. sought a neurological evaluation of Jennifer. (See Exh. S-1, May 1987 report by Dr. Kuban indicating that owing to Jennifer's history of short attention span a trial with Ritalin was suggested but not strongly pushed.) Mother recounted that after a brief trial of the medication it was discontinued owing to adverse side effects.

Ms. B. described Jennifer's sixth grade year in Mr. Brown's class as a very difficult one. Jennifer felt bad about herself, thought the teacher did not like her, and was generally unhappy about going to school. (This represented a change in attitude from previous years.) During the course of the year school personnel raised concerns regarding the appropriateness of the program for Jennifer and recommended that she be placed in the "LABB" class the following year. Parent was concerned about the possible stigmatizing effect of such placement, discussed her concerns with the administration, and ultimately deferred to Lexington's suggestion. Ms. B. characterized seventh grade as disastrous for Jennifer (i.e. - she was unhappy, not learning, hiding the fact of her placement in the program, suffered from headaches, stomach aches). Once again, during the course of the year, Jennifer's teacher (Ms. Dunn) repeatedly told parent that program was not working for Jennifer. Parent requested of Mr. Lombard that Jennifer be returned to Mr. Brown's room, which request was denied.

At the end of that year parent rejected the IEP calling for Jennifer's continued LABB placement and was thereafter offered a

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program for Jennifer within Mr. Brown's class, it being Lexington's position that the program would be altered from grade 6 so as to better meet her needs.

Ms. B. recounted Jennifer's summer 1990 participation in the Carroll School summer program*, indicating that it was a positive experience for her. (See Exh. P-24; see also Exh. S-27, 28, revealing that Jennifer was not accepted into the Carroll School academic year program.) Upon her return to Mr. Brown's class in the fall, however, her anxiety, negative attitude about attending school and somatic complaints re-commenced.

In testifying about the current school year Ms. B stated that when Jennifer works on mainstream projects with a mainstream classmate, she does the art or copying components, e.g., while the other student does the substantive work. She further noted that while earlier in the year friends did not mind helping Jennifer with her school work, they are now getting frustrated and impatient.

According to Ms. B. Jennifer herself has expressed the desire to attend a different school and is not concerned about the possiblilty of placement with some younger classmates as long as she can be taught to learn.

As per this witness Jennifer's counselling terminated over the summer of 1990 owing to exhaustion of insurance, and LPS did not offer to furnish the therapy thereafter.

2. Mary Ellen Efferen (Director of Education, Shriver Center; holds Masters degree in special education; holds no MA certification) was a member of the Shiver interdisciplinary team which evaluated Jennifer in November 1989. (See her educational evaluation, Exh. P-8, as well as Chart of Test Scores, 11/89 administration, infra). As part of this process she reviewed selected school records, spoke to Jennifer's then LABB teacher (Ms. Dunn) and observed her in the LABB classroom**.

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*This program was not funded by LPS.

**Ms. Efferen testified that Jennifer's LABB placement was in many respects inappropriate for her, citing the differing learning styles of the students, and general "confusion" of the program. Moreover, as per Ms. Efferen, Ms. Dunn herself expressed concerns about the appropriateness of the program for Jennifer, particularly with respect to its impact on her self-image, given that: (1) her social skills were so far above those of her classmates; (2) she was very unhappy and tried to hide the fact that she was a student in the classroom; and (3) she was sensitive about the presence of Downs Syndrome classmates. Nevertheless Efferen acknowledged that there were aspects of LABB (e.g., the reading component) which were appropriate to Jennifer's needs.

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More recently she reviewed updated records, including Dr. Dinklage's file review, as well as the "Searls" article* and the IEPs of other students in Mr. Brown's class.

Efferen characterized Jennifer as a basically illiterate 14 year old girl with good social skills, whose academic performance is significantly below what one would expect cognitively, even based upon her low average WISC-R performance, with the gap between herself and her peers widening. (Ms. Efferen added that if Jennifer's WISC subtest scores are analyzed using the "ACID" approach articulated in the Searls' article submitted by Lexington, she then emerges more within the average as opposed to low average range.) In Efferen's view, Jennifer has the potential to be literate, however she does not yet have the educational strategies to deal with her documented needs. In further describing Jennifer's status and learning needs Efferen indicated that she had not mastered the sound symbol system of oral and written language, does not appear to have any strategies or techniques to compensate for her difficulties and demonstrated no consistent approach to word analysis. She was also noted to spend considerable time and energy denying her problem and masking her difficulties.

Efferen offered the following criticisms of Lexington's IEP (and program) both of which, in her opinion, fall short of meeting Jennifer's needs: (a) prioritization of goals is not accurate - i.e. reading should be number one; (b) heavy emphasis on phonics and spelling represents use of same approach which has been unsuccessful for 8 years; (c) IEP does not sufficiently address the teaching of learning strategies, per se; (d) concern with returning to a program like the one she participated in for grade 6, in which she failed (as acknowledged by Lexington's recommending removal from said program); (e) IEPs of the other students in Mr. Brown's class are not reflective of a cohesive group of language/learning disabled students whose main reason for placement in the class is a primary language/learning disability requiring "strategy" teaching; (f) students are coming and going from Mr. Brown's classroom for different subjects; (g) Mr. Brown's classroom is not a truly substantially separate language based/learning disabilities model as recommended by Shriver; (h) the program would not offer Jennifer integration of learning strategies and content work; (i) the support to mainstream model proposed by LPS is not appropriate for Jennifer at this time, as she must first learn "learning strategies" and improve her reading ability.

*See Exh. S-21, " How to Use Scores In Reading/Learning Disability Diagnosis," by Evelyn Searls.

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Ms. Efferen went on to state that many different public school programs have in good faith been tried for Jennifer over the years; however, she has never been placed in a truly self-contained, homogeneous, intensive, language based learning disabilities program, which both bombards her with strategies for learning, language, memory/studying skills and integrates same with the teaching of content material*. This model is precisely what Jennifer requires, time is of the essence, and the Lexington program does not meet these criteria. Efferen further testified that asking Jennifer to compete in the arena of an 8th grade mainstream situation (while only possessing 3rd grade skills) is contraindicated both academically and socially as (1) Jennifer will not understand/retain content material peresented to her; and (2) her self-image will be further diminished. Thus, in Efferen's view, at this point in time an appropriate academic peer group must be prioritized over a social peer group for Jennifer, particularly since she has strong social skills.

Group and individual counselling was further recommended by Ms. Efferen to enhance Jennifer's understanding of her learning disability and academic strengths and weaknesses.

This witness indicated that only in special circumstances does she recommend private placements for students, but given Jennifer's needs, age and educational history she is such a special student.

Based upon her knowledge of the Landmark School (literature, staff conversations, observation) she endorsed it as an appropriate placement for Jennifer.

2a. Additional components of the 1989 Shriver evaluation may be summarized as follows:

-Psychology - Based on three administrations of the WISC over time (1984, 86, 89, see Chart, infra.) Jennifer's Performance IQ scores were consistently near the lower end of the average range, her scores on verbal tasks were typically lower, with only a few subtests in the average range, and thus her FS IQs have revealed intellectual functioning within the low average range. The scatter and pattern of her subtest scores strongly suggest a learning disability. Examiner noted difficulty reconciling her failure to make much academic progress with her intelligence test results which would have predicted a higher level of accomplishment. Emotional issues are also noted.

*without embedded languge structures

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Psychiatric - Found Jennifer to have a chronic minor depression and recommended that both she and her mother resume counseling.

-Occupational Therapy ("ot") - Found no ot services to be indicated.

-Physical - Noted low birth weight, episodes of otitis media as a young child, intact vision and hearing.

-Speech/Language - Jennifer was found to demonstrate significant difficulties in all language areas with her profile reflecting a language-based learning disability. (At chronological age 13-3 Jennifer's receptive language scores ranged from 9 years to 10-7 months and expressive scores ranged from 9 years 5 months to 10 years 11 months.) Her difficulties were in word retrieval, remembering, identifying and expressing salient information, formulating, organizing and sequencing her thoughts and understanding higher level linguistic concepts. Placement in a self-contained program for adolescents with learning disabilities, as well as language therapy 2-3 times, weekly was recommended.

-Audiologic Evaluation - Normal auditory sensitivity bilaterally, no typanometic evidence of otitis media and no evidence of a central auditory processing disorder.

3. Robert Brown (M.Ed., special education; certified teacher of special needs, see resume, Exh. S-12) is the author of the IEP under consideration, taught Jennifer during academic 1988-89 (grade 6) and is furthermore her current teacher.

Mr. Brown characterized Jennifer as a student with a moderate to severe language based learning disability, manifested by difficulty in reading (decoding/comprehension), writing skills and spelling. Math is further an area of weakness. [When questioned as to why he viewed Jennifer as moderately vs. severely disabled (as characterized in the Shriver evaluation summary), he responded that his opinion was based on her progress over the past three years.] Mr. Brown assessed her reading attack skills at the high 3rd grade level, and her reading comprehension at the low 4th grade level (adding that she could not read a newspaper at this point in time). This witness further testified that while in his view Jennifer has the potential to improve in reading, writing and spelling, he cannot not predict the extent of such progress (although he feels she ultimately has the potential to be able to read a newspaper). Jennifer was further described as needing encouragement in the educational setting, and an understanding of both her strengths and difficulties. Mr. Brown explained that she hasn't yet come to grips with the notion of herself as a learning disabled person. She doesn't always like to be corrected, is reluctant to read in the mainstream setting, and prefers reading individually as opposed to within a group. Moreover, if she feels a task is too difficult, she may at times try to avoid it.

This witness described his current program as a 502.4 learning

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disabilities class, furnishing a warm, supportive learning environment. The class is comprised of 12 students (see Parent's exhibits, App. B; and see profiles, Exh. S-9), 4 sixth graders, 4 seventh graders and 4 eighth graders, and is staffed by himself and an assistant teacher (Ms. O'Grady). Students are mainstreamed for various subjects and either he or his assistant teacher accompany them to mainstream science and social studies*. Jennifer receives English, vocabulary, reading**, writing and math within a small group teaching situation in the substantially separate class (i.e. - she is sub-grouped with given students for given subjects, see Exh. S-9, Jennifer's schedule/groupings). Mr. Brown acknowledged that the groups are somewhat fluid (owing to the individual schedules of the students), hence all the same students do not necessarily participate in the prescribed group(s) each day. (For example, in the case of Jennifer's vocabulary, group, there are certain days when 3 or 4 of the assigned students are together, other days when only 2 are together, etc.) He further testified that there are periods during the day when more than one group is present and working in his room at a given time***, adding that in the vast majority of these cases both staff people are present and circulate among the students. [There is one period per week when Jennifer (and her group) are present in the room along with another group of students and only one staff person is present.]

Mr. Brown indicated that he feels homogeneity is an important factor in terms of a learning situation for Jennifer, adding that such homogeneity exists for her in his classroom. He explained that the factors he considers when formulating student groupings include skill levels, learning style and social issues.

In testifying as to Jennifer's schedule Mr. Brown indicated that he, on a rotating basis with Ms. O'Grady, teaches her English (reading, spelling, writing, vocabulary,) and math. Although her IEP calls for math five times per week, Jennifer actually only receives it four (and in some instances three) periods weekly, however she receives more weekly English than called for by the IEP (up to 8 sessions), as in his opinion it is more beneficial for her to have the additional language work.

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*In Jennifer's case she is accompanied to social studies by Mr. Brown and science by Ms. O'Grady.

**Reading however is furnished her on an individual basis approximately 90% of the time.

***note that different groups are not necessarily working on the same subject matter

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(He admitted parental consent was not secured on this change in the IEP.) Brown testified that there is only one formal whole class writing period per week (an additional period is available for writing or math, but more generally for Jennifer it is used for math). He further indicated that the vocabulary and spelling components of his program are not integrated with the writing component. This witness explained that while her IEP as originally written calls for small group social studies to be provided within his classroom, Jennifer is in fact mainstreamed for this subject. Mr. Brown testified that he secured oral parental permission for this change in September, 1990 (see Exh. P-14), owing to the fact that Jennifer would have been the only 8th grader not mainstreamed for social studies, hence necessitating a 1:1 situation, and further that she had a positive attitude toward the notion of a mainstreamed (as opposed to a 1:1) environment.

Mr. Brown testified that the approach he utilizes in teaching Jennifer this year, is in his opinion, languaged based, entailing small group instruction, repetition, reinforcement, and utilization of specific methods for presenting information to her. He went on to explain that her reading, writing and spelling deficits are addressed in special as well as regular education classes via support from special education staff, and adaptations/alternatives as needed to the regular curriculum. Mr. Brown noted, by way of example, that if there is an assignment which requires reading of a text book, he finds time during the day to assist her in focusing in on required information; likewise with studying for a test, completing an assignment, etc.

Mr. Brown presented testimony with regard to Jennifer's sixth grade experience, indicating that during that year (1988-89) her classmates in his program had higher skills than she, and Jennifer became frustrated and distracted; he therefore recommended that she be placed the following year in the LABB program, a more functional program with more similarly situated peers. (See Exh. P-15.)

In comparing her current skills with those of 1988-89 this witness indicated that Jennifer is more comfortable in the classroom, can now write readable sentences, even paragraphs (which she could not do in grade 6) with improved structure, vocabulary and grammar. He further characterized her progress in reading and spelling as very good, indicating that she demonstrates an increased willingness to read, noted that she does well and is an active participant in mainstream social studies, and finally that she does not express concerns about family issues (e.g., missing her father) as she did in grade 6. Socially she is very popular within the context of the regular education population. (See also October 1990 progress report, Exh. S-10.)

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With regard to Jennifer's needs vis a vis educational programming, this witness testified that his classroom and the student groupings therein are appropriate for her, that the services she is receiving are sufficient so as to allow her to attain her maximum potential and that Lexington's IEP fulfills the Shriver Center recommendations. Thus, in his view, Jennifer does not require a residential program, which he characterized as too socially restrictive. Based upon his November 1990 visit to the Landmark School, Mr. Brown raised concerns with said program, including geographical removal as well as the small number of potential female classmates.

4. Gayle O'Grady (assistant teacher in Mr. Brown's classroom; certified in speech/language; enrolled in masters program for special education) worked with Jennifer both in grade 6 and currently. Ms. O'Grady stated that Jennifer works much better with the current students in Mr. Brown's class than she did with the 6th grade groupings, adding that her current peers are appropriate for her.

This witness testified that she works daily with Jennifer (on a rotating basis with Mr. Brown) on spelling, reading, language and math within the special education classroom, and further accompanies Jennifer (and 3 other special needs students) to mainstream science. In her latter role, she coordinates with the science teacher, previews and reviews material, assists Jennifer in class and with homework. Ms. O'Grady testified that Jennifer is an active participant in class, demonstrates excellent peer relationships and is more focused in the mainstream than she was in grade 6.

With regard to progress in her basic academic skills Ms. O'Grady offered the following assessment: (1) Reading - this is Jennifer's weakest area, she is working in a fourth grade level text, is now more willing to read (than she was in grade 6), and can do a better job with contextual clues; (2) Writing - she can use a dictionary, has some editing skills, keeps her notebook well, is not as reluctant a writer as in grade 6; (3) Math - also a weak area for Jennifer, working in a grade 5 book, can compute better than in grade 6; can read a clock.

In Ms. O'Grady's view Jennifer has been making good progress in reading, math and writing. She did not feel Jennifer would progress faster in a different educational setting. (This witness noted that out of a 35 hour academic week Jennifer spends 25 hours either within a special education setting or with support from specialists.) She did state however that counselling outside the school setting would enhance her progress.

This witness acknowledged that Jennifer has recently mentioned problems with some peers, has expressed a desire to learn faster and read without such difficulty, and likewise a desire to go to Landmark.

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Ms. O'Grady took issue with the conclusions reached by independent evaluator, Dr. Chaskelson (infra) as: (a) Chaskelson did not engage in a substantive discussion her; (b) the science class Chaskelson observed was not representative as it was a review for a test.

5. Warren Winslow (Social Studies teacher, Clarke Middle School, see resume, Exh. S-12) testified that his mainstream 8th grade American History class consists of 23 heterogeneously grouped students (of whom Jennifer is among the lowest functioning in reading skills), meets on a daily basis, and utilizes an 8th grade text as a resource (i.e., students are to parallel in text what is worked on in class). The instructional format includes lectures, videos, etc., and students often break into groups (among which he circulates) for cooperative learning. Mr. Winslow indicated that he confers daily with Mr. Brown, (who accompanies the 4 special needs student to class), explaining that Mr. Brown also circulates, assists in taking notes, modifying assignments, etc. Mr. Winslow likewise noted that he modifies assignments and expectations as well as extends time (if needed) for special needs students.

In this witness' opinion Jennifer is an enthusiastic, motivated student who tries hard, is working up to her potential, and is benefiting from mainstreaming. (He therefore gave her a "B" in the course although her performance, objectively, is low but passing.) (See progress report, Exh. S-10.)

6. Summer Richards (Science teacher, Clarke Middle School, See Resume, Exh. S-12) testified that his mainstream physical science class consists of 21 (heterogeneous) students, four of whom have special needs. (Ms. O'Grady accompanies them to his class.) He characterized Jennifer as among the least able of the students in the class. As per this witness a text book, as well as other ancillary materials are used, his class involves a variety of instructional formats (discussion, demonstration, etc.) but is primarily a lab format. Mr. Richards indicated that Ms. O'Grady circulates and assists/re-directs students as needed and further does the 1:1 interface that allows Jennifer to do well in Science. He in turn speaks often to Mr. Brown and Ms. O'Grady, and modifies assignments/expectations. Special needs students may take tests within the classroom (Ms. O'Grady assists in reading/interpreting the questions), and if needed complete the test outside the classroom.

Mr. Richards testified that Jennifer does well in the hands-on component of his program, and is improving in completing assignments and her investment in the work. She does chose not to read aloud in class.

In his opinion she is appropriately placed in his class, is doing reasonably well and is benefiting from mainstreaming (in the area of cooperative learning, for example). (See Exh. S-10, October 1990 progress report.)

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7. Margaret Read (licensed speech/language pathologist, LPS; holds a certificate of Clinical Competence-ASHA; see her resume Exh. S-12) has known Jennifer for 3 years, reviewed the files (including outside evaluations), spoken with teachers, observed her in class, visited Landmark, and currently provides her once weekly small group language services.

Ms. Read characterized Jennifer as a moderately to severely language-disabled student who presents with difficulty keeping focus. She added that in her opinion there are factors in Jennifer's profile, in addition to this language based learning disability, which also impede her ability to learn.

This witness testified that Jennifer is showing steady progress in areas tested, over time, and referred in this regard to a summary of speech and language test results (Exh. S-17). She further testified that she feels Jennifer is capable of more than what she manifests on her testing. Upon further questioning Ms. Read acknowledged that certain of the tests relied upon (e.g., the WORD and WRAT (level I)) were normed for students well below Jennifer's age.

In describing and assessing Jennifer's current program from a language vantage point Ms. Read first addressed the question of peers, indicating that her classmates within the special education classroom represent relative language peers. In terms of the students in her speech/language group, they too have language needs which are workably compatible with Jennifer's (that is, needs in the same areas but not necessarily at equivalent functioning levels), and in Read's view, Jennifer can both develop within the context of this grouping and is not disadvantaged by placement with these students. Substantively, as per Ms. Read, her group sessions with Jennifer are individualized, an ecclectic approach is used, and she does confer with teachers regarding vocabulary used in other classes. She added that her work with Jennifer over the past year and a half has been more specific and coordinated with classroom reading/phonics than that therapy provided in grade 6. Ms. Read further stated that she and Mrs. Newman* do not coordinate the contents of their language sessions with Jennifer, however they both work from the same IEP goals.

Insofar as Mr. Brown's classroom is concerned, Ms. Read testified that it in fact incorporates elements of a language based classroom, adding that while it is not a pure, restrictive, language based program, Jennifer does not require same. (Such a program, in her view, is more appropriate to aphasic or severely language impaired youngsters.) Hence, in this witness' opinion,

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*Speech/language therapist Newman sees Jennifer twice weekly, once on an individual and once on a small group basis.

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the speech and language goals, objectives and services as embodied in Jennifer's IEP are appropriate, and the Clarke School program, overall, comports with Shriver recommendations vis a vis educational services for Jennifer.

Ms. Read testified as to her concerns with the Landmark program for Jennifer, including the presence of only one certified speech/language therapist on staff, inept presentation of the science class she observed, and the fact that the auditory class was not taught by a speech/language pathologist.

Ms. Read disagreed with the conclusions reached by independent evaluator Dr. Chaskelson (infra), owing to the fact that Chaskelson had not spoken with Clarke staff and further that the science class which she observed was not truly representative of the typical science format. (See Exh. S-15, November 1990 memo from Ms. Read to Attorney Fraser; and see progress reports authored by Ms. Read, Exhs. P-16, P-17, S-10.)

8. Rachel Rosenblum (out of district liaison, LPS; LISCW, see resume S-12) has reviewed Jennifer's records, observed her in class and visited the Landmark School. Ms. Rosenblum testified that based on her observations, Jennifer is an integral, appropriate, cooperative member of her peer group (both within special and regular education contexts) and clearly enjoys being a part of the group. This witness noted that she recently recommended a behavioral consultation for Jennifer-based upon her lack of attention span, focusing and difficulty perserving with non-social learning tasks, (See Exhs. S-23 P-27).

Ms. Rosenblum expressed concerns regarding a Landmark School placement for Jennifer, including (a) her acceptance to the North Campus program (vs. the other Landmark site which is represented to be the intensive program for language disabled students); (b) the presence of only 8 other girls (which does not represent an appropriate social environment); and (c) the fact that she does not require a residential setting.

9. Dr. Lillian Dinklage (licensed Psychologist; certified school psychologist, LPS; see resume Exh. S-12) evaluated Jennifer in 1986 (Exh. P-21), reviewed her files in fall 1990, (see report, Exh. S-24) and has observed her in classes this year. In Dr. Dinklage's opinion Jennifer's intellectual potential is within the low average range, and her WISC profile is in fact consistent with that of a learning disabled child. However, while her learning disability is a serious one, there are many other factors within her profile which contribute to her learning difficulties and slow rate of progress. Cited among these were attentional difficulties (which Dr. Dinklage did not view as secondary to her "L.D.", given that she entered school resistant to instruction), prematurity, low birth weight, history

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of otitis media*, emotional issues and low average intelligence intelligence. In Dr. Dinklage's view it is unreasonable to expect that Jennifer will progress at an average rate in light of these multiple contributing factors to school learning problems.

Dr. Dinklage testified that in her opinion Jennifer requires a substantially separate program which further provides support/modification within the mainstream setting. In endorsing Lexington's program as very appropriate for Jennifer, Dr. Dinklage indicated that (a) Mr. Brown's class offers her a well organized, substantially separate teaching environment with highly qualified personnel, which is responsive to her needs; (b) appropriate teaching is utilized with her within the mainstream setting.

Dr. Dinklage acknowledged that she does not have specific knowledge of the other students in Mr. Brown's class this year.

Based upon her overview of Dr. Chaskelson's report as well as the IEPs of Jennifer's potential classmates at Landmark, this witness offered the following comments: (a) there were many aspects of Dr. Chaskelson's findings with which she disagreed and which she found to be inconsistent; (b) Dr. Chaskelson should have sought more input from Jennifer's teachers in formulating her opinions; (c) questions exist as to the homogeneous nature of proposed Landmark peers.

Dr. Dinklage further noted that there is no evidence to suggest that Jennifer's home environment negatively affects her ability to take advantage of special education, and therefore LEA funding for a residential program is unwarranted.

10. Marsha Chaskelson, Ph.D. (licensed psychologist; certified school psychologist; masters degree, special education; see resume Exh. P-23) reviewed Jennifer's records (including the Shriver evaluation, her current IEP and those of her classmates her current schedule, Landmark admissions testing, Dr. Negele's, 1990 treatment summary) observed her within the school setting, and reviewed Landmark's proposed schedule for Jennifer. She further had a discussion with Mr. Brown, Ms. Efferen, Dr. Negele, Landmark staff and a brief discussion with Clarke School teachers. Based upon this data she authored a report (Exh. P-7).

Dr. Chaskelson offered recommendations as to programming for Jennifer and further criticized the IEP/program offered by LPS. Educational recommendations were as follows: (a) to enhance Jennifer's view of herself as a learner, placement with a peer group of students with average potential and severe learning disabilities; (b) the use of a process approach to teaching

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*which, as per this witness, studies have shown to be related to later language/learning problems

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language, as her strengths lie in the area of reasoning, i.e., teaching her how to learn language, using content as the vehicle for same; (c) teaching her how to generalize language learning via consistent, language-progress oriented presentation.

In Chaskelson's view Jennifer presents with yet un-tappped potential, that is, she is not currently functioning up to her potential which, in this witness' opinion, is within the average range. (She added that this conclusion is confirmed by the Searls article, Exh. S-21.) Given Jennifer' age and the need to capitalize on motivation, Jennifer should now be furnished a full day special education program with maximum service delivery, as time is running out. In this regard Chaskelson indicated a residential component would be helpful as it would insure carryover of skills to homework study periods, as well as foster extra curricular relationships with learning peers.

Chaskelson offered the following criticisms of the Clarke School program: (a) the different needs and levels of the students in the special education class groupings would dictate discrepant teaching approaches for the students, not consistent with Jennifer's needs; further, Mr. Brown's room is more consistent with a resource room model than a self-contained class; (b) the IEP is written more in terms of skill acquisition (drill, thus tapping into her area of weakness) than process approach; (c) no specific objectives are written to address emotional/attentional functioning and, psychotherapy aside, Jennifer needs to understand herself as a learner; (d) the IEP lacks objectives vis a vis the teaching of strategies/techniques to enable her to learn, generalize and structure herself in various situations; (e) too much time is allocated to unmodified mainstreaming above her level of functioning; (f) insufficient time is allocated to skill development given her significant deficits; (g) difficult to perceive how she can be furnshied a consistent language based presentation of information when she is presented with mainsteam curriculum for 20 out of 35 periods; (h) based upon her observation Jennifer is not being taught how to generalize (e.g. - process of writing was not broken down into developmental steps or structured for her.)

In general, Dr. Chaskelson indicated that many attempts have been made over the years to modify programming for Jennifer within the public school, and these have not been successful. There are no changes which could be made within her program as currently constituted* which could render it appropriate for Jennifer at this point in time, and it is thus time for her to move on.

With regard to the trade-off between missing the social benefits of mainstreaming in exchange for receipt of intensive special education service delivery all day, Chaskelson stated that on

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*with the exception of 1:1 service delivery throughout the day

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balance the latter is clearly preferable as (1) Jennifer does not have social needs, i.e., she interacts well with the general population; and (2) she would derive social and emotional benefits from gaining skills and hence feeling good about herself as a learner.

Dr. Chaskelson endorsed the Landmark program as offering Jennifer a consistent, coordinated, day-long program using a process approach in the teaching of language and learning strategies.

11. Paul Lombard, Administrator of Special Education, LPS, has been involved with Jennifer's case throughout her tenure in 502.4 programs. Mr. Lombard acknowledged that after participating in Mr. Brown's program for grade 6, Mr. Brown recommended that Jennifer not continue in that program and she was therefore placed in the LABB class for grade 7. Jennifer was very unhappy in that program (in large part due to presence of Downs Syndrome students), however the TEAM recommended she continue in same for grade 8. Upon parental rejection LPS decided to return her to Mr. Brown's program, as the nature of the population had changed somewhat from grade 6.

In Mr. Lombard's opinion Lexington's program is appropriate for Jennifer, and the LEA is amenable to making modifications if required. He further indicated that Jennifer has made steady academic gains over time, albeit in small increments, and further that she is doing well socially.

Mr. Lombard acknowledged that LPS became aware of termination of psychotherapy (owing to exhaustion of parent's insurance) in approximately September 1990, and that Lexington did not thereafter undertake to provide same despite the fact that her IEP called for the service. ["It is further recommended that outside psychotherapy continue for Jennifer.... Lexington will continued to pay at the current contract rate."] (See Exh. S-5.) Mr. Lombard testified that LPS could, in the future, make psychotherapy available to Jennifer at no cost to parent.

12. A September 1990 treatment summary from Rose Anne Negele, Ed.D., licensed psychologist (Exh. P-9) indicates that she had seen Jennifer and her mother for a total of 19 psychotherapy sessions between April and July 1990, with treatment interrupted in July owing to exhaustion of insurance. Treatment goals for Jennifer included dealing with issues around depression, low self-esteem, loses; helping her to better understand the nature of her learning problems; helping her achieve an appropriate degree of independence from her mother and helping her develop better impulse control.

13. Pamela Houlares, principal, Clarke Middle School, testified regarding the "TEAM" concept implemented at Clarke, as well as the organization and philosophy of the school. She further indicated that Jennifer appears to be very well adjusted socially

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and has never been a discipline problem.

14. Karl Pulkkinen, public school liaison, Landmark School*; (certified Administrator of Special Education, See Exhibit P-28) presented testimony regarding the program and peers available to Jennifer were she to attend Landmark's North Campus, to which she has been accepted (Exh. P-11). While acknowledging that Landmark's brochure does not specificlly describe the North Campus program as language based, the program in fact addresses the development of language at all levels, across curricula, and also uses content areas as the medium for same. (Students' content class placements are therefore contingent on reading, comprehension and organizational abilities.) The campus population is 65 students (grades 5-10), eight of whom are girls**, and all of whom are of average intelligence and learning disabled. Classes are homogeneously grouped (so that teachers only have to teach to one level as opposed to dividing attention), small group in nature (maximum of 8 students) and run from 8:05 to 2:50 daily. Daily classes include language arts tutorial (1:1), small group language arts, math, auditory training/oral expression, social studies, and science. Physical education and electives (art, computer, science, etc.) are also offered. (See Exh. S-14.) In addition to teachers, staffing includes Department chairpeople, a certified speech/language therapist, and three counsellors. Each student is further assigned a case manager who coordinates the student's academic program and supervises staff. In the residential component teachers work with students after school hours within the context of supervised study halls, monitoring homework and social interaction. Extra-curricular activities are further a part of the program.

In terms of Jennifers projected class placements, groupings are reflected by Exh. S-26*** and staff by Exh. S-29. As indicated by Exh. S-29, not all Landmark teaching staff are currently certified in education, however those who are not are enrolled in a program leading to same.

Mr. Pulkkinen indicated that the classes initially observed by LPS staff were not those targeted for Jennifer, and furthermore that her actual class placements may be modified based on placement testing.

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*Landmark currently holds provisional approval from the Department of Education

**ranging in age from 11-5 - 14-9

***which supersedes Parent's A

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CHART OF TEST SCORES

WISC-R

	1984 (LPS)	1986 (LPS)	1989 (Shriver)
VIQ	85 (low average)	75	84
DIQ	96 (average)	91	93
FS	89 (upper limits of low average range)	81	87

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-Key Math - 5/89 (Gr. 6) (Exh. S-18) 11/90
- 3.5 g.e 4.0 g.e.

- PIAT

math 3.3 g.e.	4.9 g.e.
reading rec. - 3.1	3.6
reading comp. - 2.8	4.4
spelling - 2.7	2.3
general info. - 4.1	4.6
Total - 3.1	3.9

Woodcock Reading Mastery - 6/89 (Clarke) (Exh. S-18)
Letter ID - 12-9 g.e.
Word ID - 2.5
Word Attack - 1.2
Word Comp. - 3.0
Passage Comp. - 3.1
Total Test - 2.8

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Kaufman Test of Educational Achievement - 11/89
(Shriver) (Exh. P-8)
Reading - Decoding - 8-0 a.e./2.6 g.e.
Compr. - 8-3 a.e./2.8 g.e.

Math - Application - 8-6 a.e/3.1 g.e.
Computation - 8-9 a.e/3.4 g.e.

Spelling - 7-6 a.e./2.3 g.e.

Composite - 8.3a.e/2.8 g.e.

WOODCOCK Writing Samples (subtest) - 9.5 a.e./3.9 g.e.

PPVT-R - 10 years 7 mos.

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Woodcock - Word Attack - (8/90, Carroll School testing)
(Exh. P-24)
2.4 g.e.

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September 1990, Landmark Testing -(c.a. 14.1, grade 8)
(Exh. P-10)

PPVT - (receptive language measure 9 yrs. 10 mos.
Slosson Oral Reading - 3.6 grade level

Gray Oral Reading - 3.4 (3.6) grade level

CHMC Spelling - mid 4th grade level

Writing Sample - early elementary school level

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FINDINGS AND CONCLUSION

Jennifer C. is a child with special needs (and, attendantly, a child with a disability) falling with the purview of 20 USC 1401 et seq. and MGL ch. 71B. As such, she is entitled to a free, appropriate, public education and an IEP which assures her maximum feasible educational development in the least restrictive environment consistent with that goal. Neither her status or entitlement is in dispute, and there is likewise general agreement among experts as to the nature of her needs. (See Profile, supra.) The issue thus presented to the hearing officer for resolution is whether the IEP proposed by LPS appropriately addresses Jennifer's special needs and assures her maximum feasible educational benefit in the least restrictive environment; and in the event that it does not, whether a residential placement at the Landmark School would meet said standard.

It is my determination, based upon a preponderance of the evidence presented, that the program proffered by Lexington does not serve to maximize Jennifer's educational development, and moreover that it is not reasonably amenable to modification(s) such as would render it appropriate to her needs. I further find that the evidence does not support Jennifer's need for the most restrictive of educational settings, to wit: a residential program, and therefore parent's request for a 502.6 prototype placement at the Landmark School must fail. Substantial evidence does however exist to support the appropriateness of the day program available to Jennifer at the Landmark School, which placement shall therefore be immediately effectuated by the Lexington Public Schools. My rationale and analysis of the evidence follows.

In considering whether Lexington's current program offering will maximize Jennifer's educational development, one valuable predictor is her record of performance under the rubric of past similar programming. And, in this regard, inquiry must focus not only the degree of academic progress she has actually achieved during her tenure in the Lexington special education system, but, in addition, on whether such progress has been commensurate with her potential.

Experts for parent and school alike generally concur in assessing her overall rate of academic skill acquisition as slow*.

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*Interestingly some of the recent testing relied upon by LPS to demonstrate Jennifer's progress in fact evidences regression in certain skills; moreover certain of the instruments used were normed for students younger than she (Exh. S-17; testimony Read).

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However, expert debate did ensue with regard to quantifying her cognitive ability, that is, whether her intellectual potential falls within the low average range (Lexington's position) or more accurately, the lower end of the average range (parent's position), with experts for both parties citing treatises, and arguing various methods of interpreting WISC-R subtest scores) In this regard it was Lexington's contention that Jennifer's slow rate of progress may in fact be viewed as more effective when considered in the context of a student of low average cognitive ability; parent on the other hand asserted that such slow rate of progress is clearly not effective for a learning disabled student of average intelligence. I find that for purposes of this case it is unnecessary to reconcile what may ultimately be an irreconcilable point (i.e. - Jennifer's precise, innate, cognitive ability); for even if this controversy is viewed in the light most favorable to Lexington*, substantial evidence exists to support the conclusion that her current, significnatly depressed academic skill levels are nevertheless not commensurate with her ability. (Refer, e.g. to Shriver evaluation, Exh. P-8).

In further exploring the question of the effectiveness of Jennifer's performance to date, I consider next Lexington's argument that there are many factors** in Jennifer's profile which contribute to her learning difficulties, factors which must be considered in assessing the effectiveness of her progress. Cited among these are: (1) her prematurity (and hence low birth weight), a factor about which insufficient evidence was offered to warrant any conclusion by the hearing officer as to nexus; (2) her history of 2-3 ear infections per year for a period of approximately 3 years (which may or may not have impacted on her learning difficulties, however unrebutted medical and audiological evaluations reveal normal hearing and no residual pathology); (3) what Lexington characterizes as her "dysfunctional" family situation during early elementary school years (parents divorced owing to father's alcohol/substance abuse); (4) emotional issues; (5) historical difficulty with maintaining attention/focus, tendency to engage in avoidant behaviors when confronted with difficult academic tasks; (6) the numerous times she has changed school placements.

Focusing on these factors individually an interesting pattern of inconsistency emerges in Lexington's position - that is, many of

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*i.e. assuming Jennifer's cognitive ability does fall within the low average range

**in addition to her low average intelligence and learning disability

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the factors which Lexington cites as contributorily responsible for Jennifer's slow rate of progress, are the very same factors which the system has failed to appropriately address in her educational programming. Consider first the emotional arena. It is well documented that this is an area of need for Jennifer, and Lexington has acknowledged same, by calling for provision of psychotherapy pursuant to her IEP. Indeed both Dr. Dinklage and Ms. O'Grady (who testified that outside counselling would enhance Jennifer's rate of progress) have confirmed this educational need. Nevertheless, when Lexington was notified in the fall of 1990 that psychotherapy had been terminated owing to exhaustion of parent's insurance benefits, it failed to take responsibility for provision of such service to Jennifer. This failure represents not only a procedural, but also a substantive omission on the part of Lexington insofar as serving the special needs of this student.

Consider next the numerous educational transitions Jennifer has made over the years. With the exception of one year when the family (of necessity) moved out of Lexington, it has been at the behest of the school system that many of these placement changes were occasioned. And on a related point, query why Jennifer's continuation in the LABB program was initially recommended for grade 8 despite her LABB teacher's on-going acknowledgment of the great difficulty Jennifer experienced in that program during grade 7; query also why a return to Mr. Brown's program was next recommended given that LPS had acknowledged its inappropriateness for Jennifer after her grade 6 placement by recommending she move into the LABB class. [It is understood that Lexington's rationale was that Ms. Brown's class had undergone changes since Jennifer's 6th grade experience; nevertheless, as the hearing evolved, such changes did not emerge as so structurally significant as to rehabilitate the program for this student.]

Lastly, consider the fact of Jennifer's attentional/focusing difficulties, which LPS raises as yet another contributor to her slow rate of academic skill acquisition. Given such need, one must question the educational efficacy of placing her in a program such as that embodied in the current IEP; a program which would, even during that time allocated to "substantially separate" special education programming,* place her in a room where more than one student grouping may be present** at any given time; and where even within her own group, the actual student population does not remain consistent from one day to the next. This hardly emerges as a educational setting which would serve to mitigate distraction and enhance the ability to focus of a student with historial difficulties in these areas.

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*not to mention the time spent in a large, heterogeneous mainstream class situation.

**and working on different tasks

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In summation then, Lexington certainly cannot at once argue, in exculpatory fashion, the presence of multiple contributing learning needs as accounting for Jennifer's slow academic skill acquisition, and then, by virtue of its current IEP, perpetuate the failure to appropriately address such needs. The fact that a student may present with multiple needs in no way relieves a school system of its mandated responsibility of assuring such student's maximum feasible educational development.

Looking now more globally at Lexington's program it would, clearly, offer Jennifer some of the elements of an educational regime appropriate to her needs. Staff is certified, teachers demonstrated dedication, commitment and perserverance, individualized programming is provided within the context of the special education classroom, some elements of language based programming are incorporated in the teaching approach and speech therapy is available, as is the opportunity for mainstream experiences. However, given (1) expert recommendations for an intensive self-contained language-based program (Shriver, Chaskelson) buttressed by (2) Jennifer's record of educational performance within similar programs to date, (3) her age, and (4) her very significant skill deficits, this is simply too fragmented, too little, too late, and not sufficient to maximize her educational development. The program is not a truly self-contained language-based classroom for learning disabled students as contemplated by Shriver (which facility, it must be remembered, was the evaluation resource secured by Lexington to assess Jennifer, see Exh. P-8, testimony Efferen), but rather a support to mainstream model with many characteristics of a resource room. (Students come and go for different subjects, and even within established student groupings the population may vary from day to day; Social Studies and science are not furnished within the context of the classroom.) And, while special and regular education staff do attempt to coordinate/modify programming, the support to mainstream model embodied in Lexington's plan is simply not, by definition, a fully integrated, consistent*, self-contained program utilizing specialized teaching approaches throughout the day, across disciplines, and prioritizing the teaching of compensatory learning strategies. (This latter factor, as per expert recommendation, is a particularly critical component for Jennifer given her learning profile and age.)

It should be noted that significant questions were further raised by parent's experts as to the homogeneity of the student population within Mr. Brown's classroom - that is, whether the students in fact present with similar language/learning needs amenable to and requiring the same teaching approach, and

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*I note by way of example that even Jennifer's two speech/language therapy providers do not strictly coordinate the content of their sessions with her, testimony Ms. Read.

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intensive compensatory strategy instruction as does Jennifer. I note in this regard the assertion on behalf of LPS that no objective data has been offered to demonstrate a nexus between homogeneous student grouping and enhancement to learning. However, I further note testimony by LPS special needs teacher Mr. Brown to the effect that homogeneity is a factor he considers important in educating his special needs students and moreover that he feels homogeneous groupings are available to Jennifer within his program. (Refer also in this regard to testimony Ms. Read.)

Lastly, the IEP here under consideration allocates a great deal of Jennifer's school time to the mainstream situation*, and parent's experts concern as to the educational efficacy of this allocation is persuasive. Certainly, there are benefits inherent to a mainstream experience. However, on balance, given Jennifer's unique profile, the degree of mainstreaming contemplated by LPS's program is simply unwarranted. It is unrefuted that Jennifer is a socially well-adjusted adolescent who has derived benefit from her past mainstreaming experiences and is now armed with a good foundation in the social arena. Those social issues which do arise do so in the context of the academic situation (that is, although she does well socially in the mainstream, she cannot compete with these peers in so far as academic tasks are concerned and this is difficult for Jennifer).** In contrast her academic skills are far below grade expectancy. I am persuaded that it is logical and educationally sound at this point in Jennifer's academic career to furnish her intensive, specialized academic intervention throughout the day in order to further both her academic skill development and ultimately enhance her socialization skills so that she will not feel discomfort with social peers in an academic setting.

I turn next to consideration of the Landmark School program urged by parent. Landmark's day program would offer Jennifer a truly self-contained, intensive, full day, small group special education learning environment with similarly situated peers. It would further address her language/learning disabilities throughout the day across disciplines, in a consistent and coordinated manner (refer to testimony Mr. Pullkkinen). In the event additional speech/language services were warranted, a speech pathologist is on staff. And, in terms of social and emotional benefits, a Landmark placement would enable Jennifer to view herself within the social context of similarly situated learning peers, and

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*albeit with support for social studies and science

**Note herein Ms. B's testimony that Jennifer's friends are, of late, becoming frustrated in assisting her with academic assignments.

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thusly assist in development of a more positive view of herself as a learning disabled student. Given the elements of the Landmark program which evidence a responsiveness to Jennifer's needs, the endorsement of experts (such as Ms. Efferen and Dr. Chaskelson), and the absence of a lesser restrictive appropriate alternative, I endorse this program for Jennifer. In so doing I am mindful of the concerns raised by Lexington's witnesses regarding Landmark (including the small number of female peers, restrictiveness of private school placement, geographical removal from home community, etc.). However, as discussed supra, these factors on balance, simply are not determinative given Jennifer's good social skills, and her extreme academic neediness.

The record is unpersuasive as to Jennifer's educational needs for a residential program. Parent offered little credible evidence in support of this request for relief, (refer to testimony Dr. Chaskelson) which evidence is clearly outweighed by counterveiling evidence on point, particularly given the restrictive nature of the placement sought.

Prior to closing Lexington must be cited for a procedural violation with regard to implementation of Jennifer's IEP, involving failure to implement service delivery in a manner consistent with the terms of such IEP. (As per Ms. Brown's testimony the number of periods of English and math furnished Jennifer weekly were varied from that set forth in the IEP without parental approval.)

ORDER

Lexington Public School's shall immediately secure Jennifer's placement at the Landmark School on a 502.5 prototype basis and assume financial responsibility for tuition and transportation costs attendant thereto.

By the Hearing Officer:

Reece Erlichman

Dated:

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11/20/90

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Jamie T. and the Belmont Public Schools BSEA # 91-0387

DECISION

This matter comes before the Bureau of Special Education Appeals pursuant to the parent's request for a determination of Jamie's placement under Ch. 766 Reg. 332 (603 CMR s.28.00, p. 332). Belmont moved to dismiss the parent's request, asserting that Reg. 332 did not apply to Jamie's situation, and that even if it did, Belmont was in compliance with the regulatory language. The matter was originally scheduled for hearing on September 17, 1990, but postponed until October 1st by agreement of the parties. After a lengthy pre-hearing conference, the original Hearing Officer recused herself. The matter was reassigned and set for hearing on October 17, 1990. On that day counsel for both parties made oral arguments on their respective motions and submitted written arguments and documents to support their positions. In reaching the decision in this case I carefully considered the arguments of both parties, consisting of approximately three hours of oral argument in addition to the memoranda, and the exhibits which were marked P-1 through P-40 on behalf of the parent, and S-1 through S-19 (S-14 deleted) on behalf of Belmont. The clear preponderance of the evidence, as well as the weight of the law, supports the parent's position. I find that Jamie, from the time he became a resident of Belmont during the summer of 1990, was entitled to placement in a private, special education day school, delivering services comparable to those he had received in his last special education program at the Lab School in Washington, D. C. Therefore, the parent is entitled to reimbursement for all out-of-pocket expenses incurred by her as a result of Jamie's placement at the Carroll School in September 1990. My reasoning follows:

The operative facts are disputed by Belmont, though a close reading of the record does not reveal any basis for dispute. The documents submitted into evidence show that Jamie is an 8 1/2 year old boy who, until the summer of 1990, was a resident of Washington, D. C. During the 1989-1990 school year, Jamie attended the Lab School pursuant to an IEP agreed to by the parent and the District of

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Columbia Public School System. (P-10)1/ The Lab School is a private, day school providing special education services to learning disabled students. (P-11) The School is approved by the District of Columbia Board of Education as a private provider of such services (P-11). Jamie's placement at the Lab School, as well as his transportation to and from the school, was provided and funded by the District of Columbia Public Schools. (P-2; S-1; P-3; P-7; P-4) 2/ The Lab School is not approved as a provider of special education services by the Massachusetts Department of Education. (A fact of which I take administrative notice.)

On May 16, 1990, a TEAM meeting was held to plan Jamie's 1990 - 1991 special education program. No representative of the District of Columbia Public Schools attended the meeting. 3/ There is no evidence in the record that the parent, the Lab School, or the District of Columbia Public Schools believed a change in placement or program was appropriate for Jamie for the 1990-1991 school year. Indeed, the evidence suggests otherwise, that continued placement at the Lab School was intended by all parties. (P-2; S-1; P-4).

1/ Belmont asserts that P-10 is not, in fact, an IEP. Belmont characterizes the exhibit as "LAB papers". While the document does not follow an IEP format identical to that typically used in Massachusetts communities, there is no reason or requirement that it should. Looking at the document objectively, it contains all the necessary elements of an IEP according to federal regulations (See 34 CFR 300.346), and is a more expansive and complete teaching and assessment tool than one usually finds in Massachusetts. Exhibit P-10 qualifies as an Individualized Education Plan under any reasonable application of federal and state special education practice. Belmont did not offer any evidence to counter the best evidence presumption that P-10 was in fact what it purported to be: Jamie's 1989-1990 IEP. Belmont's dismissal of P-10 as nonspecific "papers," rather than a detailed education planning device, is misleading.

2/ Belmont argued that there was no evidence in the record that the District of Columbia Public Schools actually placed and funded Jamie at the Lab School during 1989-1990. Belmont offered no documentary evidence to support its position and ignored the documents to the contrary in evidence. Looking at the best available evidence (P-2; S-1; P-3 and P-7) there is no reasonable interpretation of the explicit language contained in those exhibits, other than to find that the District of Columbia Public Schools did, in fact, fund Jamie's private placement. It is very difficult to look at these documents and to follow Belmont's argument that they do not mean what they say, e.g. "This is to confirm that [Jamie] was placed and funded by the District of Columbia Public Schools at the Lab School of Washington for his special education program during school year 1989-1990." (P-2, S-1) It is difficult to imagine a more explicit statement upon which Belmont might feel comfortable in relying to determine Jamie's prior placement and funding status.

3/ Belmont contended that the lack of a District of Columbia Public School representative made the proported TEAM meeting null and void pursuant to 34 CFR 300.344. I do not reach this issue.

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On July 23, 1990, Jamie's mother signed a lease on an apartment in Belmont. (P-38) She moved into the apartment on August 5, 1990. Prior to moving, she contacted the Special Education Director for Belmont to inform him of Jamie's impending transfer into the Belmont Public School System and to request his assistance in locating and funding a special education program comparable to that provided by the District of Columbia Public Schools at the Lab School. (The parent-school contacts are incompletely documented at P-22; S-9; P-23; S-7; P-30, S-3) 4/ Belmont requested Jamie's educational records, but did not request permission to evaluate him prior to the start of the school year. Belmont scheduled a TEAM meeting for August 30. 1990, but the parent declined to participate, finding it premature.

Jamie's parent enrolled him in the Carroll School, a private, day school providing special education services to learning disabled students, for the 1990-1991 school year (P-39; P-40; P-17; P-18; P-12) The Carroll School is approved by the Massachusetts Department of Education for provision of special education services (a fact of which I take administrative notice). Jamie's parent asked Belmont to place and fund him at the Carroll School pursuant to Ch. 766, Reg. 332. Belmont offered Jamie a special education program in a resource room within the Belmont Public Schools. (S-3; P-30)

The issue presented by these facts is, simply, what is Belmont's obligation to a new student, who moves from another state during the summer with an approved, albeit expired, IEP calling for placement at a specialized private day school. The answer is, simply, that while Belmont completes its own evaluation and IEP process, it must provide an educational program comparable in services and restrictiveness to that which the student had most recently attended with the approval of the TEAM. The Massachusetts Regulation governing a special needs student's educational placement upon moving to a new community is quite clear and comprehensive:

> 332.0 Evaluation: Placement upon new residence.
>
> 332.1 Where a child or child's family has moved from another city or town in the Commonwealth or from outside the Commonwealth and such child was in a special education program provided by the school committee of the former community of residence, the school committee with jurisdiction over the child's new residence shall place the child immediately in a comparable program upon agreement between the Administrator of Special Education of the new community of residence and the child's parents.

4/ In Belmont's documents and written argument, a question was raised concerning Jamie's residence status due to summer vacation time spent with his grandparents in New Hampshire. This line of argument was withdrawn at the Motion hearing.

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332.2 The IEP written for the child by the school committee of the former community of residence and accepted by the parent remains in effect until, with the consent of the parent, the school committee of the new community of residence completes a new evaluation and a new IEP is written and accepted by the parent.

332.3 The school committee of the new community of residence shall assume financial responsibility for the child's special education program as of the actual date of the child's family's new residence, unless the school committees of the new and former communities of residence and the child's parents agree on a different date for transfer of responsibility.

332.4 Notwithstanding the preceding provisions of this paragraph, no school committee shall pay for a child's special education program in a private school that is not approved by the Division. If a school committee outside of the state placed a child in such an unapproved private school, the school committee of the child's family's new residence shall immediately place the child in a comparable approved private program (in accordance with p. 504.0) or public school program, with the consent of the parent, until a new IEP is written and accepted in accordance with p. 332.2.

There is no comparable federal regulation addressing inter-state transfers of handicapped students, thus the Massachusetts law will determine the issue. There is no reason to believe that federal regulators would take a position significantly different than that embodied in the Massachusetts regulation. Ch. 766 Reg. 332 reflects the federal commitment (as well as the Commonwealth's commitment) to providing the most continuous, least disruptive services to handicapped students. It requires that students receive the services in the setting most recently identified as appropriate for that student by a team of professionals, until another team has had the opportunity to consider the impact of changed circumstances on the learning needs of the student. It correctly and cogently expands the federal regulatory preference for maintenance of the status quo during the pendency of any dispute to analoguous situations, which threaten handicapped students with substantial programmatic disruption and the possibility of administrative disputes.

Indeed the United States Department of Education, Office of Special Education Programs (OSEP), which routinely answers legal inquiries from citizens and publishes memoranda concerning areas of dispute of national significance, noted recently the absence of any

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federal regulation or policy governing inter-state transfers of handicapped students. EHLR 213:267. In responding to the question whether a receiving state must honor a sending state's IEP, OSEP stated that its policy on intrastate transfers would provide the necessary guidance:

> This intrastate transfer policy requires the receiving school district to implement the IEP and placement developed by the sending school district during the pendency of reevaluation, administrative or judicial proceedings, when the parents and school district are unable to agree on an interim IEP and placement.

EHLR 213:269 (Nov. 17, 1989)

OSEP further explained that by implementation of the sending districts' IEP it meant:

> the new LEA must provide the complete program of special education and related services as described in the child's IEP, including the goals and objectives and the educational program option if that type of placement (e.g., regular class, self-contained class, residential placement) is so intertwined with the goals and objectives that it is a necessary component of the program described in the IEP.

EHLR 211:405 (Sept. 12, 1986)

The federal and state outlooks on intrastate transfers are consistent. See also: Brookline v. Bureau of Special Education Appeals, 452 N.E.2d 476 (Mass. 1983). I am confident that their perspectives on inter-state transfers would be equally consistent.

Turning back to the facts found in this matter, Jamie's last agreed upon placement under his last accepted IEP developed by the District of Columbia was the Lab School, a private day school for learning disabled students.5/ When he moved to Belmont, Jamie was entitled to immediate placement in a comparable program. (Ch. 766 Reg. 332.1) The last IEP written for Jamie and accepted by the parent "remains in effect" until the new community completes its evaluation and produces an accepted IEP. (Ch. 766 Reg. 332.2) Belmont assumes financial responsibility for Jamie's special education program as of the date he moved in, in this case, certainly no later than the first day of school. (Ch. 766 Reg. 332.3) Belmont is not obligated to pay Jamie's tuition in a private school that is not approved by the state to provide special education services. (Ch. 766 Reg. 332.4)

Belmont's arguments against funding Jamie's interim placement at the Carroll School are without merit.

5/ I assume arguendo, without deciding, that the proposed 1990-1991 IEP (P-9; S-12, 13) had not been agreed upon by the TEAM prior to Jamie's change of residence. Its validity or non-validity is not outcome determinative in this case.

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First, Belmont contended that Ch. 766 Reg. 332 did not apply in this case, as Jamie had moved to Massachusetts from another state, rather than between communities within Massachusetts. The regulatory language of 332.1 explicitly includes students who have moved "from outside the Commonwealth."

Second, Belmont asserted that Jamie did not have a "current, valid, approved IEP," that Belmont could implement as an interim measure. There is no regulatory language requiring that a new resident's IEP from the former community be "valid" or "current" or "approved." These words appear for the first time in Belmont's argument. Only subsection 2 of the regulation mentions the IEP. It states that the IEP accepted by the parent "remains in effect." To remain in effect means to have continued validity, despite circumstances which might otherwise render it ineffective, such as, arguably, an expiration date. Legislatures and courts have repeatedly and consistently directed that a student's status quo be maintained during the pendency of administrative disputes or judicial proceedings, when IEPs often "expire". The phrase "last agreed upon placement," a shorthand in the special education field for the Burlington Court's discussion of the federal "stay-put" provisions found at 20 U.S.C. 1415 (Town of Burlington v. Department of Education, 471 U.S. 359, 105 S. Ct. 1996 (1985)) is useful in this situation by analogy. Here, without a doubt the "last agreed upon placement" for Jamie was the Lab School. A continuation of that, or a placement in a comparable program, is the expectation under Ch. 766 Reg. 332.

Belmont's third argument was that, assuming the 1989-1990 Lab School IEP is valid (a point not conceded in argument), the resource room placement offered by Belmont was "comparable." Without going into details of the two placements, about which there was little evidence at the hearing, I find as a matter of law that a private day school and a resource room program within a public school are not comparable. They may offer similar remediation services, but the degree of mainstreaming, an equally critical component of any special education program, can never be equivalent. Comparing the two is comparing apples and oranges. Belmont argued that the "services" it offered in the resource room were comparable to, or better than, those offered in the Carroll School. That may well be and Belmont may have the opportunity to prove that at a full hearing. But the regulation does not discuss "services," it addresses special education "program," a term which encompasses the totality of a student's educational experience. The setting in which a student's special services are to be delivered, particularly when a highly restrictive placement is contemplated, is a crucial element in determining comparability of special education programs. Belmont also argued that it was required by law to offer the least restrictive, appropriate setting for Jamie. I agree that it must do exactly that after it has conducted its evaluation and IEP process. At this juncture, however, the law requires Belmont to offer Jamie a program comparable in services, scope, duration, target and setting, as that he was

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receiving under his last agreed upon IEP at the Lab School.6/

Fourth, Belmont argued that subsection 4 of Ch. 766 Regulation 332 prevented it from placing Jamie at the Carroll School, because his prior placement, the Lab School, was not approved by the Massachusetts Department of Education. Belmont's argument is premised on a misreading of the regulation. The regulation is aimed at preventing Massachusetts towns from placing and funding a handicapped student at a facility, which is not Massachusetts approved (and thereby monitored by the Commonwealth). Therefore, it relieves Massachusetts communities of the obligation of implementing the IEPs of new residents which call for placement in unapproved schools. Instead, the new community of residence must immediately place the student in a comparable, approved program. Here there is no disagreement that the Lab School was not approved by Massachusetts, but neither is there any request or expectation that Belmont continue his placement there. This matter does not fall under Cha. 766 Reg. 332.4. It is a simple request for continuity of programming under Ch. 766 Reg. 332.1 and 332.2.

Finally, Belmont offered the argument that Jamie had no credible special education history, and therefore, his request for services should be treated as an initial, special education referral under Ch. 766 Reg. 327. It contended, therefore, that the Bureau of Special Education Appeals lacked jurisdiction of the matter, because the parent had limited her request for hearing to a determination of Jamie's placement under Ch. 766 Reg. 332. First, as discussed throughout this decision, Belmont's recital of the pertinent facts presented in this matter was seriously flawed, and cannot be supported under any reasonable interpretation of the documents in evidence. Second, there is no requirement in federal or state special education procedures, or in the Administrative Procedures Act, M.G.L. c.30A, that a person requesting a hearing delineate the specific regulatory basis for the request. Indeed, both federal and state special education practices permit a hearing on any matter relating to the identification or education of a handicapped student. See 34 CFR 300.504; Ch. 766 Reg. 401. In order to elicit the information crucial to determining the most appropriate education option for a student, parties to special education hearings are not typically held to strict standards of procedure and evidence. In this case the parent's request for a hearing under Ch. 766 Reg. 332 served not to limit her right to present any and all relevant evidence and argument bearing on Jamie's interim placement, but to give notice to Belmont of the issues it would be expected to address at a hearing. Given Belmont's participation in the hearing process, the parent's request seemed to have served just that purpose.

In sum, I find Belmont's factual and legal arguments unsupported in the record and unpersuasive. While I am mindful of counsel's obligation to offer any reasonable argument to advance a client's position, in this instance I found that Belmont's narrow

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6/ While OSEP rulings are not dispositive, they are instructive. See, EHLR 211:405 at page 5 supra.

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interpretation of the law benefitted neither the student nor the school, and created an unnecessarily adversarial environment in what should be a cooperative process. I would hope that the evaluation period and TEAM process will serve to re-establish healthy channels of communication for Jamie's benefit.

ORDER

Jamie T. is entitled to a special education program at a private, day school, providing services to learning disabled students, comparable to that he received under his last agreed upon IEP through the District of Columbia Public Schools. Belmont became responsible for providing such a program by the first day of the 1990-1991 school year. Belmont failed to provide a comparable program pursuant to Ch. 766 Reg. 332. Parent enrolled Jamie at the Carroll School, a Massachusetts approved private, day school providing services to learning disabled students. Parent is entitled to reimbursement for all out-of-pocket expenses resulting from the appropriate unilateral placement. Belmont is responsible for continuing Jamie's placement at the Carroll School, until such time as an alternate placement proposed through the IEP process is accepted by the parent, or ordered by the Bureau of Special Education Appeals.

Lindsay Byrne, Hearing Officer

Dec 19 1990
Date

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12/14/90

In re: Kerri L. BSEA #91-0394

DECISION

A hearing on the above-numbered hearing was held at the Northeast Regional Center of the Department of Education in North Andover, MA. on November 7, 1990. At the request of both parties, the record remained open until November 16, 1990 for receipt of closing arguments.

Persons present for all or part of the hearing were:

Mrs. L.	Mother of Kerri L.
Peter Finn	Attorney for Kerri and her mother
Fred Pineau	Friend of Mrs. L.
James Zakris	Psychiatrist, CHMC
Edward Peterson	Director of Special Education, Billerica Public Schools
Thomas Nuttall	Attorney for Billerica Public Schools
Edward O'Brien	Program Director, St. Ann's School
Gail Jenkins	Assistant Director of Special Education, Billerica Public Schools
Sandra Sherwood	BSEA Hearing Officer

ISSUES

1. Whether the proposed family therapy services provided by Billerica Public Schools (hereafter, Billerica) through the services at St. Anne's Home, maximizes Kerri L.'s educational development in the least restrictive setting; if not,

2. Whether the family therapy services should be provided by Dr. Zakris at Childrens' Hospital Medical Center.

STATEMENT OF THE FACTS

1. Kerri L. is a six year old student of average intelligence with age appropriate academic skills, but with severe emotional/behavioral problems requiring a residential therapeutic educational program at St. Anne's Home in Methuen, MA. (See IEP, Exh. S1, Exh. P1)

2. Kerri's emotional needs have been longstanding. In December, 1987, Kerry's father died suddenly at her home. Kerri's reaction was intense. She entered into therapy with Marcus Associates. She cried and tantrumed in school. In March, 1988, she in fact required hospitalization at McClean's Hospital, where she stayed until May, 1988.

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During the 1988 - 1990 school years, Kerri received therapy again, but with several different therapists; Dr. Weiner, Lee Tuttle, and Ms. Bennett. (Testimony of Mrs. L.) By May, 1990, Kerri's emotional condition deteriorated; she again required hospitalization; this time at Childrens Hospital Medical Center (CHMC) where she stayed until August, '90. During this stay, she switched therapists several times both for individual as well as family therapy. Her longest work with one therapist was with Dr. Zakris who saw her for individual, and at times, for family therapy until her departure from the hospital. Kerri in fact continued to see Dr. Zakris weekly; approximately one half of the time was spent with Kerri; the other half of the time with Kerri and a family member. (Testimony of Dr. Zakris)

3. In September, '90, Billerica placed Kerri at St. Anne's home on a diagnostic basis. (Exh. S2) Here, she receives an education in a therapeutic setting designed to address emotional, behavioral, and learning needs of its students. (Testimony of Mr. O'Brien) In October, Billerica decided that the placement was indeed appropriate for Kerri and decided to continue her placement there on a more permanent basis, ie, a 502.6 prototype IEP, for the November, 1990 - November, 1991 period. (Exh. S1, P1) Although St. Anne's offers individual and family therapy, Kerri has been receiving individual therapy at St. Anne's, and has, at the parent`s expense, been continuing the family therapy with Dr. Zakris at CHMC. (Testimony of Dr. Zakris, Mrs. L., Mr. O'Brien)

4. Billerica asserts that the family services offered at St. Anne's is appropriate for Kerri and should therefore be provided there. It is easier for a therapeutic program to work with Kerri if all services are provided by its staff, allowing for a better integrated program. (Closing Brief).

5. Mrs. L. asserts that the family services should be provided by Dr. Zakris at CHMC, for Kerri has established a long term relationship with him and it is important that it not be broken at this time. (Testimony of Dr. Zakris) Accordingly, Mrs. L. requests that she be reimbursed for therapy and transportation expenses incurred by her since September, 1990, and that prospectively, Billerica should provide for Kerry's weekly therapy and transportation to and from Dr. Zakris'. (Testimony of Mrs. L.).

FINDINGS AND CONCLUSIONS

Billerica's proposed IEP's for the September - October, 1990 and the November, 1990 - November, 1991 periods fail to provide for an appropriate service provider for her long term family therapy needs. The IEP must be amended to include the services of Dr. Zakris, as follows:

1. The parties are in full agreement that Kerri is a student in

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need of special education and that such includes not only a residential therapeutic educational program but also individual and family therapy services. (Exh. S1, P1) The only issue in dispute is whether St. Anne's or Dr. Zakris should provide the family therapy services.

2. A relationship of trust is critical for Kerry in order that her therapy be effective. Although trust is always an important element, Dr. Zakris was persuasive in his opinion that it is particularly important for Kerry. Despite her numerous relationships with various therapists, she has been unable to trust sufficiently so as to address deeper level traumas with them. Dr. Bennett was unsuccessful in getting Kerry to talk. (Testimony of Mrs. L.) Dr. Zakris had great difficulty getting Kerry past the stage of rejecting him. Lisa Banner, the therapist at St. Anne's, described Kerry as very difficult to get to know. (Testimony of Dr. Zakris) She is just now opening up to Dr. Zakris and is beginning to address these traumas. According to Dr. Zakris, it is critical that this process not be stopped. Given her tendency to refuse to discuss deeper level issues and her difficulty in opening up to therapists, it is critical that she be with a therapist with whom she has this trust and that such therapist be with her on a long term basis. Dr. Zakris was persuasive that without this, Kerry's therapy cannot be effective. (Testimony of Dr. Zakris) Billerica provided no evidence disputing the fact that Kerry has great difficulty establishing a relationship of trust or that Kerry in fact needs such a relationship on a long term basis.

3. Although Kerry has begun an initial relationship with Ms. Banner at St. Anne's, it was, for the September - October, 1990 period, only transitory, for her placement at St. Anne's was a diagnostic placement. (Exh. S2) Furthermore, her relationship with Ms. Banner continues to be a temporary relationship given the fact that Ms. Banner is leaving the facility at the end of December. Finally, the evidence supports the fact that Kerry and Ms. Banner have not established a close relationship and have not addressed any traumas, as stated by Ms. Banner to Dr. Zakris. (Testimony of Dr. Zakris) Accordingly, Kerry has no trusting relationship with a therapist other than Dr. Zakris at the time of the hearing. Given the recognized need for this trusting relationship, Billerica is responsible for providing it.

4. Kerri is capable of transitioning to a new therapist, although it may take a period of time - a period that can not be predicted easily. Her ability to transition is evidenced by the fact that she has begun to trust Dr. Zakris after an initial difficult period. Furthermore, she was able to establish a relationship, albeit brief, with Dr. Medeis at CHMC. Given the fact that she is in a residential setting where she is receiving individual therapy, the potential exists for establishing a relationship in the future, when St. Anne's has a therapist available for a long term relationship and when such therapist has established a relationship with Kerri. How long it will take to establish such a trusting relationship is an unknown factor,

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given her history. However, if and when a relationship is established with a therapist at St. Anne's - a therapist who will be able to provide a more long term relationship for her, then there is no reason why such person cannot service Kerri. Although Dr. Zakris asserts that Kerri should stay with him, his reason was her difficulty in establishing trusting relationships. But if she in fact establishes a relationship with the therapist at St. Anne's, then his assertion is no longer persuasive. He also stated that Kerri should remain with him so that if she should remain at St. Anne's only for this year, she would not have to switch therapists again. However, given the severity of her difficulties, I was not persuaded that she would be leaving St. Anne's at the end of this year. Furthermore, if she should leave, she may resume her work with Dr. Zakris, or possibly continue seeing the therapist at St. Anne's on a private basis. (Testimony of Mr. O'Brien) At any rate, given the lack of any such therapist currently at St. Anne's, no order can be made for such. Accordingly, Dr. Zakris is the appropriate service provider for Kerri's family therapy until and if a replacement is available.

5. Billerica's assertion was unpersuasive that the use of an outside family therapist would hinder St. Anne's efforts to address her needs. In fact, St. Anne's is familiar with such arrangement, for 4 - 6 of its students currently work with outside family therapists. Mr. O'Brien, the representative from St. Anne's, and the witness for Billerica, did not state that this arrangement is untenable; in fact, he stated that if there is cooperation and communication between the therapists, and if the therapy styles are compatible, it can be appropriate. (Testimony of Mr. O'Brien). Billerica provided no evidence contradicting this. He further stated that he was unaware of any incompatibilities in Dr. Zakris' and St. Anne's therapy styles. His only concern was the need for better contact between therapists. (Testimony of Mr. O'Brien)

6. Although the parent provided evidence to support an assertion of several procedural violations over the past several years, even if accurate, they would not have been outcome determinative as far as the parent's current request for an outside family therapist, and is therefore not a factor in deciding that Kerri's family therapy should be provided through Dr. Zakris.

ORDER

Billerica shall provide for Kerri's family therapy services through Dr. Zakris and the individual therapy at St. Anne's from September, until January 31st. Billerica shall also provide for the communication between Dr. Zakris and St. Anne's therapist on a regular basis. Thereafter, as soon as, and if, Kerri has developed a trusting relationship at the level which St. Anne's therapist believes he/she can replace Dr. Zakris on a long term basis, then Billerica is free to propose a change in therapists,

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through the Team process, and an appeal of such IEP if necessary. Billerica shall reimburse the parent for all out of pocket expenses for Kerry's therapy and transportation to and from Dr. Zakris' since September, 1990.

SIGNED: Sandra L. Sherwood

Sandra Sherwood
Hearing Officer
Bureau of Special Education Appeals

DATED: December 14, 1990

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

FEB [illegible]91

IN RE: MEGHAN M. **BSEA #91-0462**

ORDER

On January 30, 1991, the parent of Meghan M requested, through her advocate Ms. Gorzynski, that the Winchester Public Schools (hereafter, Winchester) be ordered to produce to the parent Megham M school record, including her transcript, health record, and attendance record. Given the right of the parent to all documents in Meghan's student file, I order that Winchester make all such documents available to the parent. In so doing, I note that, according to Winchester's 1/18/91 letter, (see attachment #1) all documents have been released. However, if this information is incorrect and further documents exist, then they should be submitted to the parent immediately.

Sandra W. Sherwood (CKRA)
Sandra W. Sherwood
Hearing Officer

Dated: February 4, 1991

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3/12/91

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEAL

IN RE: TIMOTHY C. AND THE BOSTON PUBLIC SCHOOLS BSEA NO. 91-0550

DECISION

This decision is issued pursuant to M.G.L. c. 71B, 30A and 15, 20 U.S.C. s. 1401-1461, 29 U.S.C. s. 794, and the regulations promulgated under those statutes. A hearing was held on December 6, 1990, and January 10, 1991, at the Administrative Offices of the Boston Public Schools, in Boston, MA. Those present for all or part of the proceeding were:

Mr. and Mrs. C.	Parents
Christine Vulopas	Third Grade Teacher - Atrium School
Suzanne Perlman	Psychologist
Sandra Koerber	Tutor
Deborah Awerman	766 Coordinator - Carroll School
Evan Levinson	ETL - Boston Public Schools
Carolyn Riley	North Zone Special Education Program Advisor
Rosella Waters	Special Education Teacher - Garfield School
Nancy Borofsky	Attorney for Parents
Marien Evans	Attorney for Boston Public Schools
Lindsay Byrne	Hearing Officer, BSEA

The evidence consists of documents submitted by the parents labeled P-1 through P-30, exhibits introduced by the school marked S-1 through S-5, and approximately 12 hours of recorded oral testimony. Written closing arguments were submitted by both parties by January 25, 1991, and the record closed on that date.

ISSUES

1. Whether the 1990-1991 502.4 IEP proposed by Boston Public Schools is reasonably calculated to provide the maximum feasible educational benefit to Timothy in the least restrictive setting;

2. If not, is a 502.5 placement at the Carroll School the least restrictive, appropriate educational alternative for Timothy?

PARENTS' POSITION

Timothy has a language-based learning disability coupled with extreme distractability. He needs a quiet, distraction free classroom and a highly structured, repetitive, specific learning curriculum in order to learn to his potential. The Carroll

91-0550

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School offers the type of focused, small-group learning in which Timothy functions best. The classroom proposed by Boston was similar to the one at the Atrium where Timothy had been too distracted by the auditory and visual stimuli to learn effectively.

SCHOOL'S POSITION

Timothy presents as a mildly learning disabled youngster, who has many age-appropriate strengths and well developed adaptive skills. He has been able to acquire basic academic skills in a regular education setting. The IEP offers him placement in a self-contained, special education classroom in a group of similarly able peers with teaching techniques and tools, specifically geared to address his type of learning difficulties, as recommended by prior educational evaluations. Timothy is not so disabled that his learning needs cannot be met within a public school setting.

SUMMARY OF THE EVIDENCE

There is little disagreement about the pertinent facts, thus they may be briefly summarized:

1. Tim is an eleven year old Boston resident. He has at least average intellectual ability, but has a history of difficulty acquiring basic academic skills in a regular classroom setting. He attended the Atrium School, a private, regular education school from September, 1985, through June, 1990, for kindergarten (repeated) through third grade. In September, 1990, Timothy was enrolled in the fourth grade at the Carroll School, a private Chapter 766 approved school. Tim has never attended the Boston Public Schools.

2. Evaluations performed through the years yield consistent results. Tim is described as a highly motivated learner, with solid visio-spatial skills that permit him to excell at art and good social skills and self-esteem. With a good deal of structure and support he has been able to acquire the basic academic skills necessary to perform close to grade level. Nonetheless, he displays attentional and auditory weaknesses, which interfere with his academic and behavioral performance. His reading skills are basic and all writing tasks are extremely labored. He needs one-to-one teaching with few auditory or visual distractions to learn new information. He requires reminders and encouragement to produce written material. He benefits from individual presentation of a structured reading program. Tim performs best when presentation and production of material are untimed, with ample opportunity for self-correction.

3. Ms. Vulopas, Tim's third grade teacher at the Atrium School, confirmed the observations of the evaluators. She testified that Tim needed to sit next to a teacher during all group instruction

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in order to reinforce and check his behavior. He needed clear, repeated directions and expectations for his performance. Writing for Tim was awkward and painstaking. Without one-to-one teacher attention Tim could not produce any written work, including math problems on paper. After individual reading tutoring was begun in January, 1989, Tim made steady progress in the acquisition of basic reading skills. (See confirming testimony of Koerber). Nevertheless, his skills did not keep pace with the rest of the group. Despite many classroom modifications, including a separate work-area, teacher assistance with daily organization of materials and schedule, individual presentation of new material, and increased teacher direction, monitoring, and reinforcement, it became obvious during Tim's third grade year that the structure of the Atrium School's "open classroom" was inappropriate for Tim. To learn well, Tim needs a classroom with few or no distractions from the main teaching event, highly-structured presentation of all material to be learned, and an extremely high teacher-student ratio. (Vulopas; P-7, P-3).

4. At the suggestion of Atrium School staff and Tim's reading tutor (Koerber) Tim's mother requested a Team evaluation from Boston Public Schools in the spring of 1990. She also visited several private non-special education schools in the Boston area, as well as the Carroll School. Ms. C. believed that the small, highly structured classes available at Carroll would best suit Tim's learning style. Tim applied to Carroll in February, 1990, and was accepted in March, 1990. (Ms. C., Awerman).

A Team meeting was held on June 5, 1990, at which Tim's learning needs were discussed. The Team agreed that Tim needed to be placed in a substantially separate 502.4 program, designed for students of a least average intelligence with specific learning disabilities and no major behavioral problems. (Ms. C., Levinson). That recommendation was sent to the Special Education Director of the North Zone, who was responsible for making the school assignment. The assignment to the Garfield School was made during the course of the summer of 1990, and rejected by the parent.

5. Rosella Waters, the special needs teacher in the classroom proposed for Tim at the Garfield School, described the program. There are eleven students in the room, aged nine to eleven years old (4th and 5th graders). All have average cognitive functioning and specific learning disabilities. All have some auditory processing difficulties and are distractable to some degree. (See P-4, P-5). There is a full-time instructional aide in the classroom (qualifications unknown). The instructional focus in the classroom is helping the students develop strategies to pay attention to what is important and to screen out distractions, rather than reducing the stimulation for them. The most important technique is overteaching and repetition.

Special needs classrooms follow the same curriculum as regular

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education, though presentation of the material might be modified (Riley). The Garfield School uses a basal approach to teaching reading, so the basal readers are incorporated into the proposed classroom's instruction, and supplemented with elements of a linguistic approach.

Two of the fifth grade students are mainstreamed for math and reading into regular 4th grade classes. Within the special education classroom there are generally two academic groups working at the same time, one supervised by Ms. Waters, one supervised by the aide. Typically the classroom day follows this schedule:

8:45-10:30	- Writing Program - individual seatwork doing writing exercises in folder (45 or 90 minutes)
9:30-11:00	- Reading - two groups a.) 4.2 reading level and b.) 2.1 reading level. (45 or 90 minutes)
11:00 to Lunch	- Math - two groups a.) 2nd grade level and b.) 3rd grade level; - Music - Library - Physical Education - Work with volunteer student teachers - Computer class
Lunch	
Lunch to Dismissal	- 2 days Social Studies - entire class - 2 days science - entire class - 1 day Physical Education - entire class.

Ms. Waters testified that, although there are many things happening in the classroom at once, the class is teacher directed and driven, with an underlying structure and high expectations that promote learning. (Waters)

Ms. C. visited the proposed classroom in June and October, 1990. She found it to be a happy classroom, where the students were enthusiastically engaged in learning. But she thought it environmentally inappropriate for Tim. It was a large classroom with at least two working academic groups. There was a lot of auditory distraction from the murmur of the groups, the bells and public address system. There was a lot of visual distraction from the presence of the other group, and the movement of students between groups and to and from mainstream classes. (Ms. C.; See also testimony of Koerber.)

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6. Deborah Awerman, the 766 Coordinator at the Carroll School, described the program Tim is following there. (See also P-13 through P-29). Carroll is a Chapter 766 approved private school, designed to serve the learning needs of students of average intelligence with specific learning disabilities and no significant behavioral problems. Carroll offers a highly structured, sequential languaged-based curriculum in small groups of students of similar age and ability. Each classroom is small, carpeted and has few visual distractions. Material is teacher presented. All students are taught appropriate learning behavior (e.g.- eyes on speaker. ears open, feet on floor) and organizational skills (e.g. - pencil ready, subject notebook out, others put away). All students follow a similar academic schedule. Remediation techniques are implemented across the curriculum and focus on the acquisition of basic language and study skills which can thus be broadened to apply to any new learning experience. Carroll School offers a modified outward bound program called Bounders, which is designed to foster a student's sense of competence and self-esteem and to provide an opportunity for "real life" application of skills learned in the classroom. Individual tutoring for language, math, and speech is available.

Tim is in the Lower Division of the Carroll School. His classes are composed of ten and eleven year olds with cognitive and learning profiles similar to his. (P-11). His daily schedule is consistent throughout the week: (P-12)

8:25-9:10	Math	- seven students -	Johansen teacher
9:10-9:55	Science	- seven students -	Johansen teacher
10:05-11:35	Language	- six students -	Strone teacher
Lunch			
12:15-1:00	Physical Education		
1:00-1:45	Arts		
1:45-2:30	Social Studies	- seven students -	Dolbar teacher
2:30-3:15	Enrichment - seven to twelve students (reading aloud, study skills, extras)		

The math class uses the Attack scenes developed by Carroll. Tim is working at the 3rd grade level on basic arithmetic and sequential functions. (P-15).

The science class is hands-on, process oriented instruction at approximately the fourth grade level (P-13). Language instruction is based on Project Read for written expression and comprehension and Orton-Gillingham for spelling and reading. Once a week the speech therapist conducts a class in oral

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expressive language. The content and skill sheets used in the class are shared among all the teachers so that skills and vocabulary can be reinforced across the curriculum. (P-17, 18, 19, 20, 29)

Social studies is a content based class currently using the McGraw-Hill Textbook "Earth's Region". The techniques of Project Read are used to decode the text. Tim is working between the 3rd & 4th grade levels. (P-14). Physical education, Arts and Bounders are all designed to build upon and expand the skills learned in academic settings and to promote self-esteem and communication skills. (P-16, P-22, P-23, P-24).

According to Tim's teachers, he is active, and very easily distracted by auditory stimuli. He has benefited from the structured classes, rules, sequences, sequential instructions and repetition and shown this through great improvement in spelling and handwriting and a generally more relaxed approach to learning. In the Carroll School environment Tim is performing appropriately and does not require one-to-one teaching. (P-10,P-30). It is expected that Tim will move to Carroll School's Middle Division in the 1991-1992 school year. (Awerman)

FINDINGS AND CONCLUSIONS

There is no dispute that Timothy C. is a student with special learning needs as defined by Ch. 71B and 20 U.S.C. 1401 et seq., and is thus entitled to receive a free, appropriate public education. Neither is there disagreement about the nature and severity of Tim's learning disabilities. The issue presented in this matter is which of the proposed programs, the 502.4 LD class at the Garfield School, or a 502.5 placement at the Carroll School, will provide the maximum feasible educational benefit to Timothy in the least restrictive environment consistent with that goal. After careful consideration of all the evidence in this matter, and of the arguments of counsel for both parties, it is my determination that a preponderance of the evidence supports Timothy's placement at the Carroll School for the 1990-1991 school year.

I recognize that Timothy's documented learning difficulties are not of a type or a severity which would ordinarily require placement outside the continuum of programs available within the public school setting. I further note that Boston comes to this hearing with the serious disadvantage of never having had Timothy within the system, thus having had no opportunity for long-term, real life assessment, intervention and planning. Nevertheless, despite this I am obliged to consider the unique circumstances presented by this child and to make an individualized determination. In so doing, I have paid close attention to the intelligent observations of Timothy's mother and to the professional recommendations of his third grade teacher, Ms. Vulopas. These two witnesses, who have had the longest association with Timothy, were able to describe exactly which educational environment and techniques Timothy responded to well,

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and which did not suit his learning style. I was convinced by their testimony that, in order to learn effectively and to make progress commensurate with his educational potential, Timothy needs a highly-structured, rigidly-focused educational environment. This includes classrooms with few auditory or visual distractions from the main event; routinized, repetitive presentation of material; similar techniques employed across content areas; assistance with study skills and organizational skills; the opportunity for one-to-one reinforcement of newly learned skills; and age-appropriate, intellectually challenging academic content.

I am persuaded that the program at the Carroll School, as described by Ms. Awerman and documented by many of the parents exhibits, offers Timothy the type of intervention and structure, which is appropriately geared to the remediation of his learning disabilities. (See also testimony of Ms. C., Koerber; P-10, 12-30). While there is no reason that the same type of closely structured teaching environment could not be implemented within the Boston Public Schools, and provide equal benefits to Timothy, Ms. Waters' testimony established the fact that a different, more open, more "real-life" classroom approach had been chosen by the Garfield School, and Boston did not propose any alternatives to this setting. (See also testimony of Ms. C.). The evidence shows that this approach had not proven effective with Timothy in the past. There is no reason to believe that an educational approach similar to that used in the Atrium School would provide Tim with the appropriate education to which he is entitled. To be appropriate for Timothy, his classroom must meet his needs for quiet, structure, routine, repetition, and intellectual challenge. I found little evidence at the hearing that Timothy's unique needs had been considered prior to offering the 502.4 Garfield School classroom. Nor was I convinced that the environment or teaching strategies available at the Garfield could be modified to suit Timothy's learning requirements.

Given the similarity in approach and educational philosophy between the Garfield School classroom offered by Boston and the Atrium School classroom, where Timothy had experienced increasing frustration and failure, I find that Ms. C. was justified in rejecting the 503.4 IEP proposed by Boston for the 1990-1991. I also find that the program offered by the Carroll School is appropriately tailored to Timothy's unique learning needs, and that Ms. C. acted reasonably in enrolling Timothy at the Carroll School for the 1990-1991 school year.

ORDER

The 1990-1991 502.4 IEP proposed by Boston is not reasonably calculated to provide the maximum feasible educational benefit to Timothy C. The Carroll School is the least restrictive,

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appropriate educational placement about which there was evidence at the hearing. The parents are entitled to retroactive reimbursement of all tuition and transportation charges, resulting from his enrollment at the Carroll School in September, 1990.

Lindsay Byrne
Lindsay Byrne
Hearing Officer

Dated: March 11, 1991

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11/19/90

In re: Lawrence G. BSEA #91-0598

DECISION

This decision is rendered pursuant to Massachusetts General Laws, Ch. 71B, 30A, 20 U.S.C. 1401 et seq., and the regulations promulgated pursuant to these statutes.

A hearing on the above-numbered case was held at the Western Massachusetts Regional Office of the Department of Education in Chicopee, MA. on October 19, 1990. Persons present for all or part of the hearing were:

Mrs. G.	Mother of Lawrence G.
Mary Kimball	Springfield Union-News
James Fenlason	Special Education Director, Springfield Public Schools
Sandra Langone	Teacher, Springfield Public Schools
Mella Singleton	ETL, Springfield Public Schools
Michael Glickman	Principal, Beal School, Springfield Public Schools
Mary Callahan	Special Education Supervisor, Springfield Public Schools
Sandra Sherwood	BSEA Hearing Officer

ISSUE

Whether Lawrence G. is a student in need of special education as defined by 20 U.S.C. 1401 et seq. and M.G.L. Ch. 71B.

STATEMENT OF THE FACTS

1. Lawrence is an eight year old third grader in Springfield's regular education program at the Beal School. He is a gifted student whose cognitive abilities are tested to be in the very superior range (149 verbal, 130 performance, 144 full scale IQ scores from the WISC test) (Exh. S2, P4).

2. On May 30th, 1990, Mrs. G. requested that Lawrence be evaluated in order to determine whether he was a student in need of special education. (Exh. S6, Testimony of Mrs. G.) In so doing, she requested that a psychological evaluation be conducted. (Exh. S6, page 2)

3. On August 31, 1990, the TEAM convened in order to determine whether Lawrence has needs for special education. In so doing, the TEAM concluded that Lawrence was not in need of special education. (Exh. S1, P1) On September 8, 1990, Mrs. G. rejected this finding. On September 23, 1990, a request for a

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hearing on this matter was received by the Bureau of Special Education Appeals.

4. Mrs. G. asserts that Lawrence cannot make effective progress in his current third grade regular education program, for Lawrence needs to be placed with students similar to himself,in a small group setting, with an individualized curriculum tailored to his skill level and his interests, in a setting outside of the regular school facility. She asserts that Lawrence will, in time, have difficulty if placed in a program geared to students of cognitive abilities lower than his. (Testimony of Mrs. G)

Springfield asserts that Lawrence has no attributes or handicaps which deter him from making effective progress in the regular education setting, that he in fact is making effective progress in the program, and finally, that the regular education program is able to provide an enriched, individualized learning which allows Lawrence to excel at his own pace. (Testimony of Ms. Langone, Mr. Glickman)

FINDINGS AND CONCLUSIONS

I. Lawrence G. is not a student in need of special education. Under federal law, a child in need of special education is defined as a handicapped child who

> is evaluated ...as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.
>
> 20 U.S.C. 1401 (a)(1), 34 C.F.R. s.300.5

Under state law, a child in need of special education is defined as a child, who,

> because of temporary or more permanent adjustment difficulties or attributes arising from intellectual, sensory, emotional or physical factors, cerebral dysfunctions, perceptual factors, or other specific learning impairments, or any combination thereof, is unable to progress effectively in a regular education program and requires special education.
>
> M.G.L. Ch. 71B s.1, 603 C.M.R. s.103

Lawrence is clearly not a handicapped student; rather he is gifted. Thus, under federal law, he is clearly not covered, for he is not handicapped. Furthermore, under state law, he is not a student with attributes which render him unable to make effective progress. That is, he is described as a well adjusted,

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interested, enthusiastic learner, he is described as a student who performs well in school on tests, in class participation, etc. He is described as a student who is in fact performing in a manner that would lead to progress. (Testimony of Ms. Langone) The psychological evaluation report reinforces this description, for it reveals Lawrence to be a student who is cognitively very gifted, with an absence of any attributes or handicaps which would interfere with his learning, and a student who is performing above grade level. (Exh. S2) Furthermore, the evidence supports Springfield's position that he has made effective progress. That is, Lawrence did progress from a first semester grade two reading book to a last semester grade three reading book in one year; he did progress similarly in math. (Testimony of Ms. Langone) Mrs. G. provided no evidence contradicting such position. To the contrary, she stated that her concern is more about his future progress. (Testimony of Mrs. G). Although Lawrence's Gray Oral test score of a 5-6 grade reading skill raises the question of whether Lawrence actually progressed at the lower level as testified to, Springfield was persuasive that Lawrence still has many skills to learn at the lower level, and accordingly, his progression from 2nd - high 3rd grade level does indicate progress. (Testimony of Ms. Langone)

In addition to the progress in skill level, the evidence supports the fact that Lawrence is working effectively in class. He generally applies himself well, he earns very high grades. (Testimony of Ms. Langone) Accordingly, Lawrence is a student who is able to make effective progress.

2. Springfield provides services within its regular education program which address Lawrence's giftedness; he receives his math, reading and language arts with the fourth grade students; he receives a 1:1 mentor once/week wherein he pursues projects related to the space shuttle, an interest of Lawrence's; his third grade teacher has extensive experience teaching in a gifted program; she is in fact offering individualized research projects within her class which happens to have at least five very bright, avid learners. Springfield also has available within the regular education program an adjustment counselor, if any social/emotional issues arise. Finally, Springfield is providing Lawrence with extra 1:1 work with a regular education teacher on penmanship, for this is a weakness of his, albeit not of sufficient magnitude to interfere with his educational progress. (Testimony of Ms. Langone)

ORDER

Lawrence G. is not a student in need of special education as defined by state or federal law; accordingly, Springfield is not required to provide such to Lawrence.

Signed: _____
Sandra Sherwood, Hearing Officer

Dated: November 19, 1990

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3/29/91

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Joseph F. **BSEA #91-0652**

DECISION

This decision is issued pursuant to M.G.L. c. 71B, 30A, and 15, 20 U.S.C. 1401-1461, 29 U.S.C. 794, and the regulations promulgated under those statutes. A hearing was held on March 11, 1991, at the Central Office of the Boston Public Schools in Boston, MA. Those present for all or part of the proceeding were:

Joseph F.	Student
Mr. and Mrs. F.	Parents
Harry Parad	Clinical Director, Wediko Children's Services
Mark Sullivan-Hanson	Clinical Consultant, Wediko Children's Services
Neal Elliott	Program Director, McKinley School
William Kelly	SPED Advisor, West Zone
Marien Evans	Attorney for Boston Public Schools
Lindsay Byrne	Hearing Officer, BSEA

The evidence consists of one document submitted by the Parents labelled P-1, exhibits introduced by the school marked S-1 through S-29, and approximately 4 hours of recorded oral testimony. The student was represented by his father, Mr. F., who appeared pro se. Oral closing agreements were made at the hearing, and the record closed on March 11, 1991.

ISSUE

1. Whether the 1990-1991 502.4(i) IEP proposed by Boston is reasonably calculated to provide the maximum feasible educational benefit to Joseph in the least restrictive setting?

PARENTS' POSITION

Boston Public Schools failed to properly diagnose Joseph's dyslexia and to provide adequate remediation in prior special education programs. Joseph will not attend the proposed placement at the McKinley School because he does not feel safe there as a racial minority. Joseph needs to feel comfortable in order to learn. He has agreed to attend the Edna Stein Academy, a private special education school, which provides the small classes and therapeutic environment he requires.

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SCHOOL'S POSITION

The McKinley School offers the small, highly structured classes designed to remediate Joseph's significant academic deficits, in a supportive, therapeutic environment, as recommended by the Team and subsequent examiners. McKinley also provides individual, group, family, and drug and alcohol

counseling as recommended by Joseph's therapists. There is no evidence that Edna Stein Academy, a more restrictive placement, offers equivalent educational services.

SUMMARY OF THE EVIDENCE

1. Joseph is a fifteen year old Boston resident who has not attended school in any meaningful fashion for the past year. Joseph has average intelligence but tests three to four years below expected age and grade levels in all academic areas. Joseph displays concrete thinking, distractability, irritability, poor impulse control, poor self-esteem, and poor interpersonal relations in addition to a history of drug and alcohol abuse and chronic truancy. (S-2, 23, 16, 6)

2. Joseph attended public school for kindergarten. He transferred to parochial school where he repeated second grade. An evaluation conducted by the Boston Public Schools in Joseph's 4th grade year resulted in a recommendation for his placement in a substantially separate classroom for bright, learning disabled youngsters. His parents declined the proposed placement and Joseph remained at Holy Name for his fourth and fifth grade years. He transferred to the Boston Public Schools for the 6th grade in September, 1988. Joseph was reading at the third grade level and unable to keep up with the academic demands of the 6th grade mainstream classes. A Team evaluation was held which recommended his placement in a self-contained class for learning disabled youngsters for the remainder of the school year. No space was available in the class at his then current school (Shaw), so his parents requested that Joseph receive services in the Resource Room instead of transferring to another school in mid-year. Joseph entered the 502.4 class at Shaw for his 7th grade year, 1989-1990. Joseph complained that the work was too difficult, though his teacher noted he was able to do the assignments. Joseph's in-school behavior deteriorated throughout the Fall, 1989. After the first semester of school, Joseph became chronically truant. He entered Westwood Lodge for 21 days in the spring, 1990, to address his substance abuse and truancy difficulties. He did not return to the Shaw during the 1989-1990 school year. (Mr. F., Mrs. F., Joseph F., Kelly, S-20, S-6, S-2, S-13, S-9, S-21, S-22, S-24, S-23, S-25, S-26, S-27, S-18, S-17).

3. A Team meeting held in June, 1990, recommended that Joseph be placed at the McKinley Middle School for the 8th grade, 1990-1991 school year. Joseph attended one day of school in September, 1990. He refused to return because he was "the only white kid." Joseph's parents rejected the proposed education

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plan on September 13, 1990. They requested that Joseph be placed at a private special education school, the Clearway School. Mediation was held, but did not resolve the dispute. Joseph was admitted to Bournewood Hospital for treatment of substance abuse issues on December 28, 1990. He underwent some educational testing and tutoring while an inpatient at Bournewood. Upon his discharge on January 18, 1991, Joseph entered the Adolescent Day

Treatment Program sponsored by Bournewood Hospital and received tutoring there. (Joseph F., Mr. F., Mrs. F., S-6, S-16).

4. Educational and psychological evaluations performed by various experts over the course of the last three years have consistently recommended similar educational programming. Joseph will benefit from instruction tailored to his achievement level and learning style in a small group of similarly able peers. He needs a highly structured setting with clear expectations, firm limits, and consistent consequences. The setting should be warm and supportive. Joseph should participate in individual, small group, family, and substance abuse counseling on a weekly basis. (S-16, S-2, S-8, S-11, S-12).

5. Joseph's parents are requesting that Boston fund Joseph's placement at the Edna Stein Academy, a Ch. 766 approved 502.5 placement. No substantial evidence was offered concerning the programs, services, staff qualifications or curriculum available at the Edna Stein Academy.

6. The program at the McKinley Middle School was described by the Program Director, Neal Elliott (S-14). The school serves 56 students ages 11-15 with a variety of educational difficulties requiring education in a small, separate setting. All students require assistance with academic functioning and social-emotional issues. Joseph would be placed in a classroom with nine other students. There are two teachers in the class - A strong, male teacher certified in special education, and a licensed social worker certified in regular education. Instruction is specifically geared toward remediation of learning disabilities. The teachers consult with specialists from the Carroll School and the Reading Clinic at the Massachusetts General Hospital. In addition, a learning disabilities specialist is available for individual tutoring, if warranted. The students are all 14 and 15 year olds of average cognitive ability. Their academic skills range from 3rd to 7th grade, so that Joseph's skills fall in the middle of the range. The class is self-contained and receives academic and pre-vocational instruction (carpentry, construction, business, office, computers, food service, retail, mechanics) as a group. Academics and pre-vocational instruction is closely coordinated, so that all learning is based on real, concrete experiences.

McKinley is a therapeutic educational environment where guidance, social work, psychological and psychiatric staff and consultants offer on-going, intensive support to the students and the program. The school uses a standard step/level system to

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score student behavior and encourage pro-social values. Every student has an individualized contract which is incorporated into the leveling system. Each class has a class contract to encourage peer cooperation and support for individual performance. The class has weekly group therapy. In addition, individual, family, and substance abuse therapy are available

through McKinley staff and consultants. (Sullivan-Hanson, Parad) (See also S-4, S-7)

An intensive residential treatment program is offered to McKinley students, who need summer programming, through Wediko Children's services. The program, located on 480 acres and a lake in New Hampshire serves 160 students with 140 staff. The program on therapeutic intervention on a model which continues and reinforces that in place at the McKinley School. The program provides daily individual, small group and substance abuse counseling along with frequent family meetings. It also provides daily academic remediation, pre-vocational skills instruction, and recreational opportunities. (Parad)

FINDINGS AND CONCLUSIONS

There is no dispute that Joseph F. is a student with special learning needs, as defined by M.G.L. ch. 71B and 20 U.S.C. 1401 et seq., and as such is entitled to receive a free appropriate public education. The issue here is whether the McKinley program offered by the Boston Public Schools is appropriate to address Joseph's documented learning needs in the least restrictive setting. After a thorough review of all the evidence in the record, and careful consideration of the parties' agreements, I find that the clear preponderance of the evidence supports the conclusion that the IEP drafted by the Boston Public Schools is reasonably calculated to provide the maximum feasible educational benefit to Joseph in the least restrictive setting.

That there was little evidence upon which I could render a judgment about the Edna Stein Academy placement requested by the parents is of minor significance. The McKinley Middle School program as described by Mr. Elliott, Mr. Sullivan-Hanson, Mr. Kelly and Dr. Pard, contains all the elements identified by various evaluators as necessary for an appropriate educational program for Joseph: small classes, academic remediation, prevocational instruction, therapeutic milieu, behavioral programming, clear expectations and limits, individual, group, family and substance abuse counseling. (See discussion at .6 above). I was impressed by the witnesses' enthusiasm for the program, their commitment to working with students who have complex, long-standing learning problems and with families that are often troubled and hurried, and their belief that Joseph could indeed benefit from the range of services offered at McKinley. I am persuaded by an independent assessment of the credible evidence that the McKinley offers educational services in an educational setting that are appropriately geared to Joseph's learning needs.

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I am similarly persuaded that Joseph could benefit from the therapeutic environment and academic remediation available through the Wediko summer program. Given the length of time Joseph has been out of school, it would be appropriate for him to receive remedial services in a therapeutic setting over the course of the 1991 summer vacation in order to be properly prepared to enter high school. Thus, the Wediko summer component should be offered to the parents and to Joe as an elective component of either the McKinley Middle School IEP, or one drafted for the 1991-1992 school year.

The parents did not observe the McKinley Middle School program. Their objections to it were based on Joseph's reluctance to attend the program. Joseph refused to attend McKinley because he did not want to be a member of a minority group within the school. Racial prejudice is a severely limiting personal handicap, but it is not one which requires accommodation under Federal and State special education laws. Boston Public Schools has fulfilled its obligation to Joseph under those statutes. It is up to Joseph to take advantage of the educational opportunities he has been offered.

ORDER

The 1990-1991 502.4(i) IEP developed by the Boston Public Schools is reasonably calculated to provide the maximum feasible educational benefit to Joseph F. in the least restrictive setting.

By the Hearing Officer:

Lindsay Byrne (LBA)
Lindsay Byrne

Date: March 29, 1991

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MASSACHUSETTS DEPARTMENT OF EDUCATION

BUREAU OF SPECIAL EDUCATION APPEALS

JAN 9 1991

IN RE: Scott G. **BSEA #91-0778**

RULING ON MOTION TO JOIN

This ruling is issued pursuant to M.G.L. Chapters 71B, 30A, and 15; 20 U.S.C. 1401-1461; Section 504 of the Rehabilitation Act of 1973; and the regulations promulgated under these statutes.

STATEMENT OF THE CASE

The dispute in this matter arises from the conditional acceptance of a twenty-year-old, disabled student to a 502.5 day educational program, conducted by the Massachusetts Hospital School (MHS). Under M.G.L. Ch. 111, s. 62, MHS, a state facility that provides educational services to physically disabled children, is operated under the general supervision of the Department of Public Health (DPH). Further, the day educational program at MHS is administered by the Department of Education (DOE) through its ancillary Bureau of Institutional Schools (BIS), pursuant to M.G.L. Ch. 71B, ss.2 and 3; 603 CMR s. 28.00, 502.10 and 700

On November 27, 1990, the Bureau of Special Education Appeals (BSEA) received a motion from Richard Connolly, Deputy General Counsel for the Office for Children (OFC), who serves as Scott G.'s attorney, requesting that DOE and DPH be joined as parties in this action.

A pre-hearing conference was convened in Quincy on December 10, 1990, and was attended by: Mr. Connolly; Sandra Moody, counsel for DOE/BIS; Michael Price, counsel for DPH/MHS; and Linda Gross, Pupil Personnel Director of the Hopedale Public Schools (Hopedale). (Scott G.'s parents are residents of Hopedale.) Although Stephen Dawley, counsel for the Hopedale School Committee, was unable to attend the conference, Ms. Gross agreed to participate. In a subsequent telephone conversation with Mr. Dawley, he advised me that he had no objection to Mr. Connolly's joinder motion. Although the discussion at the pre-hearing conference focused on possible avenues for resolution, the participants failed to reach any commitments that would ensure Scott G.'s acceptance to the MHS day educational program.

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Briefs in opposition to Mr. Connolly's joinder motion were received by BSEA on December 21, 1990 from Mr. Price, and on December 31, 1990 from Ms. Moody.

REVIEW OF RELEVANT FACTS

1. Scott G. is a twenty year old disabled student who presents the following medical condition: lumbar myelomeningocele, hydrocephalus, neurogenic bowel and bladder, as well as cognitive delays. Following surgery for a spinal fusion in April, 1988, his upper extremity function was severely impaired, and he lost spontaneous respiratory effort. Scott is a quadriplegic, who is ventilator dependent. (Exh. 1 - IEP School Health Summary).

2. Scott was a patient in the acute care unit of Franciscan Children's Hospital (FCH) from May 25, 1988 to March 29, 1990. He was transferred on the latter date to New England Sinai Hospital and Rehabilitation Center (NES), where he remains to date.

3. Scott was accepted by MHS to its day educational program on February 22, 1989 with the following condition: "...he will need to come to class with his own ventilator, oxygen saturation or apnea monitor, suctioning system, oxygen tank and Ambu bag, electric wheelchair, and a competent nurse who can assist him in all aspects of his care. This nurse will have the ability to manage his respiratory care should he need suctioning, or if his ventilator fails." (emphasis added) (Exh. 2)

4. While Scott was a resident at FCH, Hopedale Public Schools, with the cooperation of FCH, proposed an Individual Educational Plan (IEP), extending from October 1989 to October 1990 that provided for a 502.5 private day program at the Kennedy Day School. Scott's parent accepted this IEP on October 23, 1989. (Exh. 3A)

5. In anticipation of Scott's transfer to NES, Hopedale proposed an amendment to the existing IEP that called for a 502.7B prototype. This amendment indicated that Hopedale would provide 20 hours weekly of individual tutoring, unless the parties agreed that fewer hours were appropriate. Mr. Connolly, Scott's attorney, accepted this amendment on April 10, 1990. (Exh. 3B)

6. On October 18, 1990, Mr. Connolly advised Linda Gross, Director of Pupil Personnel Services for Hopedale, that Scott intended to attend a day educational program at MHS, and that his enrollment in the MHS program was contingent upon the services of a nurse to accompany him round-trip from NES to MHS, and remain with him during

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the entire school day.

If Hopedale should reject the provision of a nurse in this regard, Mr. Connolly stated that Hopedale should consider his prior acceptance of the IEP amendment as withdrawn, and, further, that the IEP should be considered as rejected for the purposes of the special education appeals process. (Exh. 4)

ANALYSIS AND RULING

As previously mentioned in the Statement of the Case, the parties explored several issues that had possible impact on an eventual resolution of this case. Since the parties have not advised me further since the conclusion of the pre-hearing conference whether any progress in these other areas has occurred, I am faced with rendering a ruling on Mr. Connolly's motion to join DOE and DPH based on the obtaining relevant special education statutes, and without benefit of any additional information that may have substantive bearing on the question before me.

The critical issue is whether the joinder of DOE and DPH is essential to Scott G.'s entitlement to maximum feasible educational benefits mandated under special education statutes. Clearly, the governing statutes that guarantee the provision of special education services to school-age children from the age of three to twenty-two are: M.G.L. Ch. 71B; 20 U.S.C. 1401 et seq; and Section 504 of the Rehabilitation Act of 1973. The Bureau of Special Education Appeals is the designated state agency authorized to conduct administrative appeal hearings, and render decisions relating to disputes concerning the delivery of special education services under these statutes. The parties do not challenge BSEA's authority in the instant case.

The compelling intent of the regulatory schema, encompassed in the both state and federal special education law, is to include any public agency that is engaged in the provision of educational services to handicapped children. See 34 CFR 300.00; 34 CFR 300.341; 603 CMR s.28.00, 700.

As the general supervisor of MHS (see M.G.L. Ch. 111, s.621), DPH is mandated to provide educational services to handicapped students who are residents of MHS, and to handicapped students who attend their day educational programs. DPH is, therefore, a public agency responsible for implementing the substantive and procedural protections accorded to handicapped students under the Education for the Handicapped Act (EHA), and Section 504, and is subject to the due process procedures set out therein.

A similar responsibility rests upon DOE as the state agency, through its Bureau of Institutional Schools, which provides special education services to students enrolled at a DPH facility, specifically MHS. See M.G.L. Ch. 71B ss.2 and 3; 603

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CMR s.28.00, 502.10, 700. As a result of a Chapter 766 Interagency Agreement ratified by DOE, DPH and MHS, dealing with the delivery of educational services to children at MHS, a specific delineation of responsibilities assigned to the signatories was agreed upon for their educational decision-making policies. At issue in this matter particularly is the admission criteria invoked by MHS, as they impact on Scott's protections under Section 504 and EHA. At substantial risk in this case are the possible denial of Scott's entitlement to his full measure of educational benefits, and the inability to judiciously explore the responsibilities of DPH and DOE to assure Scott's entitlement, in the absence of the joinder of DPH and DOE. I view their full participation in these proceedings as imperative in assuring the due process rights of the student.

Therefore, the student's motion to join DPH and DOE IS GRANTED.

Phyllis Ryack

Phyllis Ryack
Hearing Officer
Bureau of Special Education Appeals

Date: January 9, 1991

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3/19/91

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: JOSE G. **BSEA #91-0868**

FINDINGS AND DECISION

This matter comes before the Bureau pursuant to a request for hearing filed by the Boston Public Schools on November 13, 1990, alleging that Jose G., an 18 year old special needs student, was "threatening and disruptive" in his then current placement, and requesting that the Bureau authorize a change of placement. A hearing under the provisions of M.G.L. c.71B and c.15; 20 U.S.C. s. 1415 and 29 U.S.C. s. 794, was scheduled for December 3, 1990. Due to uncertainty as to whether notice had been delivered to the parent, Mr. G., or to Jose G., the hearing was rescheduled for December 11, 1990, at the offices of the Boston Public Schools, 26 Court Street, Boston, MA. Neither Jose G. nor his Father appeared at the hearing nor responded in any manner to the hearing notices, which were sent postage pre-paid, and which were not returned as undeliverable. Those in attendance at the hearing were:

Marien Evans - Counsel for the Boston Public Schools

Cynthia Williams - Senior Advisor for High School Special Education

Kristen Reasoner Apgar - Hearing Officer

Although neither Jose G., nor his Father, appeared at the hearing, Counsel for Boston requested the opportunity to present live testimony and documentary evidence in support of its request that Jose G. be reassigned to the special education program at the McKinley Technical High School, a prototype 502.4i, separate special education school within the Boston Public Schools. This request was allowed.

SUMMARY OF THE EVIDENCE PRESENTED

1. Jose G. has been a student receiving special education in the Boston Public Schools since 1982, when he was identified in fourth grade as having learning disabilities. At that time a prototype 502.3 learning disabilities program was developed and provided at the Kennedy Elementary School. In fifth grade he was placed in a substantially separate (502.4) learning disabilities

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program at the same school.

2. In grades 6 through 8, Jose continued in substantially separate programs at the Mary Curley Middle School, where the special education services addressed both learning disabilities and emotional/behavioral needs.

3. The IEP prepared by Boston for the 1988-1989 school year placed Jose in a prototype 502.4i, McKinley High School program. In the fall of 1988, Mr. G. and Jose went to the Central Offices of the Boston Public Schools at 26 Court Street and spoke to Ms. Williams regarding their desire that Jose transfer from McKinley to Jamaica Plain High School. Mr. G. initially was proposing to remove Jose from special education entirely. Ms. Williams persuaded him that Jose had significant special education needs, which should be addressed in his school program. With Mr. G.'s consent, Jose was transferred to Jamaica Plain High School (his neighborhood school) and he was placed in the Learning and Adaptive Behavior Class, a 502.4 substantially separate program. Jose remained in the Learning and Adaptive Behavior Program during the 1988-1989 school year, and an IEP continuing that program was written in March 1989, and accepted by Mr. G.

4. In September 1989, Jamaica Plain High School was consolidated into English High School, and Jose was assigned to English High School.

5. October 20, 1989, the Headmaster of English High School requested that Jose's placement be changed on an emergency basis to McKinley Technical High School, because of repeated disciplinary suspensions and the student's alleged threatening and abusive behavior. (S-18 - S-22)

6. Mr. G. gave consent to Jose's change in educational placement to the McKinley Technical Program (Ex. S-19), however, Jose never attended the McKinley Program.

7. In December 1989, Ms. Williams was again contacted by Jose and Mr. G., seeking to rescind consent to placement at McKinley and to permit Jose to return to English High School. Jose was permitted to return to the LAB program at English High School.

8. A TEAM meeting was held on April 1, 1990, including Jose and Mr. G. The TEAM determined that Jose needed a more therapeutic educational environment, than that which could be provided at English High School, so that Jose's behavioral and emotional needs could be addressed, and so that he would be away from his out-of-school peers, described by Ms. Williams as gang members. The TEAM recommended the McKinley Vocational Technical High School. The IEP offered to Jose, now 18, and his father was neither accepted nor rejected and remains unsigned. Jose did not return to English High School following the April TEAM meeting. In June 1990, Jose was "discharged for non-attendance." (Ex. S-12.)

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9. In the fall of 1990, Jose again came with his father to Ms. Williams office at 26 Court Street, requesting that Jose be permitted to re-enroll at English High School. Ms. Williams ascertained that the program that Jose had been attending at English High the prior year was full, and attempted to encourage Jose to enroll in a similar program at one of the other Boston High Schools. After rejecting a program at Boston High School, Jose entered West Roxbury High School on October 13, 1990.

10. On October 31, 1990, the Headmaster of West Roxbury High School filled out a request for an emergency [change of] placement for Jose, because of alleged threats made by Jose to West Roxbury High School personnel and because of his disruptive behavior. (Ex. S-1, S-2, S-3, S-23). During the meeting held regarding the change of placement request at West Roxbury with Jose and his father and school personnel, Jose called Ms. Williams on the telephone and stated that he wanted "out" of West Roxbury. Ms. Williams told him that such a request for transfer could not be arranged over the phone. Jose became verbally abusive to Ms. Williams.

11. Jose gave a written request for transfer to Boston on November 6, 1990. (Eh. S-22.) He has not attended school since the October 31, 1990, meeting. Under Boston's disciplinary procedures he was "discharged for non-attendance" from West Roxbury High School on December 5, 1990. (Ex. S-26)

12. Boston will permit Jose to return to school, if he wishes; however, if he seeks to return, Boston will only agree to permit Jose to attend the McKinley-Technical program offered in the April 1990 IEP. It is the Boston Public School's position that Jose needs to be in a safe environment, where his tendency to engage in verbally abusive and threatening behavior can be addressed by staff trained to deal with his needs, and where he will not disrupt the school program. He also needs to be at school away from his out-of-school peers in Jamaica Plain.

13. The McKinley Technical High School Program is comprised of 80 to 100 students overall, divided into individual classes with a student/teacher ratio of 8 to 1 with an aide. Classes are primarily self-contained with some limited amount of movement between classes. Students have opportunity for vocational/technical training along with a range of basic academic subjects and physical education. Students also receive counseling provided by Guidance Advisors, who have a MSW degree. The program maintains interagency involvement with the Department of Youth Services, and tries to assist students in keeping order in their lives. Wediko Children's Services provides clinical psychiatric consultation for the Guidance Advisors. The program also seeks to foster family involvement in the student's educational program.

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14. It is Boston's position that the McKinley Technical High School Program better meets Jose's educational needs, than the programs at English or West Roxbury High Schools, because its staff are specially skilled in dealing with verbally aggressive students. If Jose returned to a large high school setting, like West Roxbury or English High School, he would continue to have significant periods of time outside the classrooms in the hallways, assemblies, etc., where he is prone to react and interact in aggressive behaviors and to be in contact with school staff who do not have the specialized training necessary to address those aggressive behaviors. McKinley Technical High School staff have the special skills to address Jose's needs, and the smaller, more controlled environment presents less situations where Jose would be likely to engage in inappropriate behavior.

15. In November 1990 Boston also offered to place Jose in the Compass Program a prototype 502.5 private day school, located in the Jamaica Plain section of Boston, which provides special education to students with learning and emotional disabilities. However, at that time Jose expressed no interest in accepting that program.

RULING

The only evidence before me in this matter consists of the unchallenged testimony of Ms. Williams, regarding Jose G.'s educational needs and the circumstances surrounding Boston's proposed educational placement, and the documents submitted by Boston. On this record it is not possible for me to determine, whether the educational placement offered by Boston would provide for Jose's maximum feasible development in the least restrictive environment. However, based on the record before me, it is my view that Boston has acted reasonably in offering the McKinley Technical High School placement as the educational placement available to Jose.

Nevertheless, should Jose return to school, something he apparently has not sought to do, and should he seek to challenge the proposed McKinley placement by rejecting the proposed IEP and/or requesting a Bureau hearing, it is my opinion that the stay - put provisions of 20 U.S.C. s. 1415 would require Jose's return to his last agreed upon placement at West Roxbury High School. See, Honig v. Doe, 484 U.S. 305, 328 (1988). (There is no exception to the application of the stay put provisions of federal IDEA to the placement of a disabled student, however if the student is dangerous, a court could order a change in placement during the pendancy of proceedings challenging the proposed placement under the usual standards for entry of a preliminary injunction.) During the pendancy of any such legal

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challenge, however, Boston could seek a preliminary injunction requiring Jose's attendance in the McKinley Technical program, and at least based on the evidence before me, Boston would appear to be justified in so doing.

By the Hearing Officer:

Kristen Reasoner Apgar
Kristen Reasoner Apgar

Date: March 19, 1991

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2/12/91

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF EDUCATION

BUREAU OF SPECIAL EDUCATION APPEALS

In re: Nicole H. **BSEA #91-0869**

DECISION

This decision is rendered pursuant to M.G.L. Chapters 15, 30A and 71B; 20 U.S.C. 1401 et seq.; and all of the regulations promulgated under each of these statutes.

A hearing in the above-entitled matter was held on January 11, 1991 at the Western Massachusetts Regional Education Center in Chicopee, MA.

Those in attendance were:

Linda H.	Mother
Roger H.	Father
Molly Ciampa	Intern
Carol Booth	Attorney for Parents
Lawrence Sweeney	Director of Special Education, Greenfield Public Schools
Carolyn Jarmulowicz	TEAM Chairperson/Liaison, Greenfield Public Schools
Margaret Doyle	Special Education Teacher, Frontier Regional School District
Peter Smith	Attorney for Greenfield Public Schools
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Parents' Exhibits labelled P-1 through P-3; Greenfield Public Schools' Exhibits labelled S-1 through S-15; and approximately 2 hours of oral testimony.

STATEMENT/HISTORY OF THE CASE

Nicole H. is a 19 1/2 year old resident of Greenfield. She is a student diagnosed with Down's Syndrome and visual impairment. Nicole's intellectual functioning falls within a moderately developmentally delayed range and she functions at an early elementary school level. She is legally blind with corrected visual acuity 20/200 in the better eye and 20/800 in the other. (See testimony, Mr. H.; P-1; S-1).

Nicole attends Frontier Regional High School (Frontier) in a neighboring school district under a 502.4 Individual Education Plan (IEP). She has attended this Frontier program since 1986 or

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for the last 4 1/2 years. Under her IEP Nicole receives special education classes, activities for daily living (ADL) skills and pre-vocational work. She has a 1:1 aide. Nicole also receives various related services which includes Orientation and Mobility Training (OMT) because of her visual impairment. She also receives summer services including OMT. (See S-1, 2, 5; testimony, Mr. H.). Although Niclole's IEP expired on November 30, 1990, the parties stimpulate that both the IEP (S-1) and the IEP amendment providing summer OMT (S-2) continue as Nicole's current IEP until updated evaluations from Perkins School for the Blind (Perkins) are received. Under her IEP Nicole received and continues to receive OMT twice per week for one hour each session.

Nicole has received OMT for the last 1 1/2 years or since the fall of 1989. She receives such services within her home community of Greenfield, provided by Ann Barber, an Orientation and Mobility Specialist, employed by Perkins. Greenfield contracts with Perkins for OMT services for Nicole. (See testimony, Mr. Sweeney; Mr. H.). According to Parents' recollection, OMT was provided by Nicole after school hours during the 1989-90 school year. According to Ms. Doyle, Nicole's special education teacher for the last 4 1/2 years at Frontier, it is her recollection that Nicole left school approximately 1/2 hour before school ended on the days which she received OMT during the 1989-90 school year, which would mean that a portion of her OMT was provided during regular school hours and a portion provided after the normal school day ended. According to Mr. Sweeney, Greenfield's Director of Special Education, it was his instruction to Ms. Barber that Nicole's OMT be scheduled during regular school hours during the 1989-90 school year. It was Mr. Sweeney's understanding that during 1989-90, Frontier's school day ended at 2:30 P.M. and that Nicole's OMT was provided from 1:30 to 2:30 P.M. or within the regular school day. (See testimony, Mr. H.; Ms. Doyle; Mr. Sweeney).

In a late August/early September 1990 meeting, Ms. Barber told Mr. Sweeney that it was convenient for her schedule to provide Nicole's OMT for the 1990-91 school year during after school hours but Mr. Sweeney directed her to schedule Nicole's OMT during regular school hours. A liability issue prevented OMT from beginning at the start of the school year but such services were offered beginning September 26, 1990 on Tuesdays and Thursdays from 12:45 to 1:45 P.M. Parents, who desired such services to be provided after normal school hours, instructed Greenfield to do nothing until they spoke to an attorney. On October 29, 1990 Mr. H. requested Greenfield to begin to provide OMT services. Ms. Barber's schedule had changed but beginning on November 6, 1990 she was able to begin providing Nicole her twice weekly OMT - on Tuesdays from 12:45 to 1:45 P.M. and on Thursdays from 1:30 to 2:30 P.M. Nicole is transported from Frontier to Greenfield for her OMT by her 1:1 aide, Ms. Keller. On Tuesdays when Nicole's OMT ends, Ms. Keller then tutors/works with Nicole until approximately the end of the regular school day. On Thursdays Nicole's OMT ends at 2:30 P.M. which is the end of the

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regular school day. (See testimony, Mr. Sweeney; Ms. Doyle; Mr. H.; P-2; S-10, 11, 12, 13, 14). On November 7, 1990 Parents rejected the provision of OMT services at the time periods assigned but accepted continuation of OMT, as currently provided, pending a hearing (S-9). The hearing, originally scheduled for December 3, 1990, was re-scheduled at the request of Parents and took place, per agreement of the parties, on January 11, 1991.

ISSUE IN DISPUTE

Should Nicole's Orientation and Mobility Training be provided after normal school hours or during the regular school day?

STATEMENT OF POSITIONS

Parents' Position is that OMT is provided within Nicole's home community of Greenfield to assist her in being able to have access to and be able to negotiate around her neighborhood community and that such OMT does not need to happen during the regular school day. Parents contend that it is most realistic that OMT be provided to Nicole after normal school hours since that is when Nicole would be within her Greenfield community. Finally, Parents contend that Nicole cannot appropriately receive all of the services under her IEP and receive OMT as well, all within the regular school day.

Greenfield's Position is that the goals and objectives of Nicole's IEP are being met under her current schedule within the regular school day and that there is no evidence to support the provision of Nicole's OMT on an extended school day basis after the regular school day has ended.

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Nicole H. is a student with special education needs as defined under state and federal statutes and regulations. The parties are in agreement regarding the nature, extent and manifestations of Nicole's special education needs. The parties are also in agreement regarding the appropriateness of Nicole's educational placement, special education program and related, ancillary services. The sole issue in dispute is whether Nicole's orientation and mobility training should be provided during the regular school day or during after school hours on an extended school day basis.

Based upon the oral testimony presented, the written documentation introduced into evidence and a review of the applicable law, I conclude that Nicole's orientation and mobility training may continue to be provided during the regular school day and need not be provided during after school hours on an extended school day basis.

My analysis follows.

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I.

There is no consensus as to the exact time Nicole received her OMT during the 1989-90 school year with Parents believing it was after school, Ms. Doyle believing OMT began during school hours and Mr. Sweeney believing that Nicole's OMT was totally during school hours. However, there is nothing within her IEP that specifically mandates that Nicole receive her OMT at any particular time. (See S-1).

Nicole attends a 502.4 substantially separate placement. 603 CMR 28:502.4(f) provides, in pertinent part, as follows:

> The daily duration of the child's program shall be equal to that of the regular school day, unless the Administrator of Special Education states that a shorter or longer duration is in the child's best interest.

On Nicole's 1989-90 IEP which, per stipulation of the parties continues as Nicole's current IEP, under Daily Duration of Program it is written: 6 hours per day. Six hours per day is a regular school day. Under Total Hours of Special Education Service Delivery Per Week on the IEP, which includes OMT twice per week for one hour each session, it is written: 30.00. Six hours per day, five days per week equals thirty hours per week of special education services. Therefore, whatever the actual practice was regarding the provision of OMT to Nicole during the 1989-90 school year, it was clearly Greenfield's intent that such OMT be provided during the regular school day. Nicole's IEP is consistent with Greenfield's position at this hearing and is consistent with the regulations governing daily duration for special education students in 502.4 substantially separate educational programs.

Further, pursuant to 603 CMR 28:322.4(a), if the child's condition is such as to require a daily duration different from that specified in 603 CMR 28:502.0 for the prototype selected for the child, in this case a normal school day under 603 CMR 28:502.4(f), the Director of Special Education shall specify such different daily duration with the reasons why the child requires a different daily duration. No such different daily duration or rationale for such different daily duration is listed upon Nicole's IEP. Finally, the issue of OMT services being provided to Nicole after school was raised at her last TEAM meeting and the TEAM decided that OMT services should be provided during regular school hours and not on an extended day basis. (See testimony, Mr. Sweeney).

II.

It is undisputed by the parties that OMT is a valuable and necessary component of Nicole's IEP and that she has derived substantial benefit from OMT over the last 1 1/2 years. It is undisputed that Nicole has made good progress in her OMT, has

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markedly improved in her mobility skills, confidence, and in her use of compensatory low vision devices and strategies. (See testimony, Mr. H.; Ms. Doyle; S-3, 4, 5, 6, 7, 8). It is also acknowledged that Ms. Barber, Nicole's Orientation and Mobility Specialist, timely consults with Nicole's teachers and therapists and provides good suggestions and professional service to Nicole and the Frontier staff who work with her. (See testimony, Ms. Doyle).

However, Parents have presented no expert evidence to support an educational justification for Nicole's OMT to be provided after the regular school day. The facts that it may be more convenient for the Orientation and Mobility Specialists's schedule and that Parents would prefer that OMT be provided during after school hours are clearly not sufficient. Ms. Doyle, Nicole's special education teacher for the last 4 1/2 years and the only education professional testifying at this hearing who has any knowledge of Nicole's daily functioning and functioning over a period of time, testified that she knew of no educational basis for Nicole's OMT occurring after the regular school day. (See also testimony of Mr. Sweeney).

Nor have Parents presented any expert evidence or any evidence whatsoever that Nicole's receipt of OMT during the regular school day has adversely impacted upon any other area of her special education program. Nicole misses a spelling activity and an in-class physical education activity on Tuesdays to receive her OMT. On Thursdays she misses a calendar and penmanship activity. However, Ms. Doyle testified that these missed activities are all very individualized; that she has perceived no adverse effects upon Nicole's learning and achievement in these areas nor in any of the areas addressed in Nicole's IEP; and that Nicole leaves Frontier for her OMT easily, without distraction or interruption, and with no negative reaction at the prescribed times on Tuesdays and Thursdays.

ORDER

Greenfield is not responsible for providing Nicole H. her Orientation and Mobility Training after the regular school day on an extended school day basis.

Raymond Oliver
Raymond Oliver, Hearing Officer
Bureau of Special Education Appeals

February 12, 1991
Date

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JAN 4 1991

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

RE: CHRISTOPHER A. AND THE STOW PUBLIC SCHOOLS BSEA #91-0895

DECISION ON SCHOOL'S MOTION TO DISMISS

This matter comes before the Bureau of Special Education Appeals pursuant to the parents' request for a hearing and the school's Motion to Dismiss. The hearing was scheduled for December 7, 1990, at which time the BSEA heard arguments in support of and in opposition to the School's Motion to Dismiss. The parent submitted a written memorandum opposing the School's Motion on December 17, 1990. After careful consideration of all the pertinent facts and law, and the arguments of both parties, it is my determination that the School's Motion to Dismiss must be granted.

A hearing concerning the IEP proposed by Stow for Christopher A. for the 1990-1991 school year was held in May and June, 1990. The BSEA issued a decision on August 31, 1990, finding that the proposed IEP was appropriate to meet Christopher's special education needs in the least restrictive setting. Parent rejected the decision and chose to place Christopher in a private special education school at his own expense. The IEP was modified to reflect the BSEA decision. Parent rejected the amended IEP and requested a hearing. A compliance hearing was held on November 20, 1990. The decision in that matter is pending.

At the Motion hearing the parent stated that the bases of the request for hearing that precipitated this case file were:

1. Whether the 1990-1991 IEP proposed by Stow for Chris is appropriate to meet his special needs in the least restrictive setting?

2. Whether Stow should be financially responsible for Christopher's placement at the Carroll School for the 1990-1991 school year? and

3. Whether Stow can appropriately implement the proposed IEP if there continues to be lead in the school drinking water?

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The parent initially claimed that none of these issues had been appropriately addressed in prior hearings. Upon further questioning the parent admitted that the issues he wished to present evidence in the instant hearing had been the subject of prior hearings, and prior decisions, involving the same parties, but that he was not pleased with the content or the outcome of those hearings.

It is well-settled that the doctrines of res judicata and collateral estoppel are applicable in administrative due process hearings. See: Almeida v. The Travelers Co., 383 Mass. 226, 418 N.E. 2d. 602 (1981). Here, it is clear that the first two issues the parent wishes to present evidence on in this case are identical to those which were the subject matter of a prior hearing between the same parties less than six months ago. That hearing resulted in a final administrative decision adverse to the parent's position. The matter is res judicata. The issues may not be relitigated in this forum. The proper avenue for re-addressing those issues, if necessary, is a formal appeal to the State Superior Court or the Federal District Court.

The third issue raised by the parent concerns the implementation of the disputed IEP pursuant to the BSEA's decision of August 31, 1990. This subject is properly addressed through a compliance hearing. A compliance hearing was in fact held on November 20, 1990. The parent claims he did not present evidence on the lead poisoning issue at the compliance hearing, and therefore, requests an opportunity to do so here. I decline to permit it. Any issues bearing on Stow's capacity to implement the BSEA decision concerning the 1990-1991 IEP should have been presented at the compliance hearing. The parent may not now raise new objections based on evidence that was available to the parties at the time of the prior compliance hearing, but which the parent chose not to present or argue. Conservation of administrative resources, as well as the principles of fairness and finality, demand closure of this matter at this level. See: Shamrock Liquors, Inc. v. Alcoholic Beverages Control Commission, 7 Mass App. 333; 387 N.E. 2d 204 (1979).

Therefore, BSEA Case No. 91-0895 is Dismissed. This is the final agency action in this matter.

Date: January 4, 1991

Lindsay Byrne RCB
Lindsay Byrne
Hearing Officer

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